A REVIEW

OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES,

IN THE CASE OF

GEO. REYNOLDS vs. THE UNITED STATES.

By GEORGE Q. CANNON.

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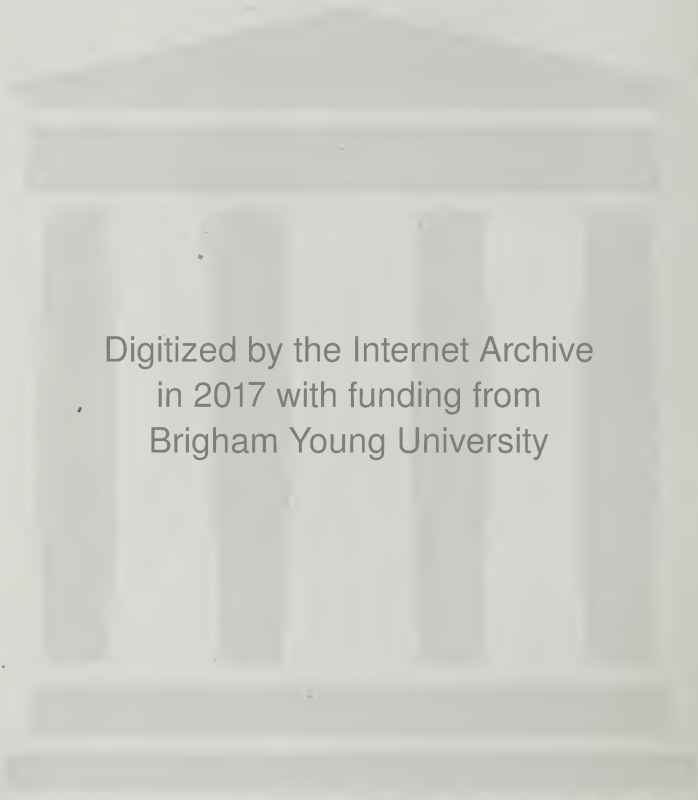

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GEO. REYNOLDS *vs.* THE PEOPLE OF THE UNITED STATES.

INTRODUCTION.

THROUGH the newspaper press, the public have been made acquainted with a recent decision of the Supreme Court of the United States upon the question of the constitutionality of a law of Congress passed July 1st, 1862, which, as found in Section 5352, Revised Statutes, and omitting the exceptions, reads as follows:

"Every person having a husband or wife living, who marries another, "whether married or single, in a Territory, or other place, over which the "United States have exclusive jurisdiction, is guilty of bigamy, and shall "be punished by a fine of not more than five hundred dollars, and by an "imprisonment for a term of not more than five years."

Mr. George Reynolds, a citizen of Utah Territory, having married a second wife while his first wife was still living, and this in conformity with the requirements of his religion, was indicted under the above statute, by a grand jury, at Salt Lake City, on 23d October, 1874. Under this indictment he was tried and convicted. An appeal was taken to the Supreme Court of the Territory, and the case was dismissed because the grand jury who found the indictment was an illegal one. This was on 19th June, 1875. He was again indicted on 30th October, 1875. And under that indictment was again tried in the District Court for the same offence. He was convicted and sentenced to two years *at hard labor* and to pay a fine of five hundred dollars. After the rendition of the verdict, it was discovered that the defendant had not been asked to plead guilty or not guilty; but he waived the informality, plead not guilty, and it was

then entered upon the record. An appeal was taken to the Supreme Court of the Territory, and it affirmed the decision of the inferior court. This was on 6th July, 1876. From the Supreme Court of the Territory an appeal was taken to the Supreme Court of the United States, the case was put forward on the calendar, and it was heard by the latter court on the 14th and 15th of November, 1878. The Attorney General of the United States appeared in the case for the Government, and George W. Biddle, Esq., of Philadelphia, Pennsylvania, and Ben Sheeks, Esq., of the firm of Sheeks & Rawlins, of Salt Lake City, Utah Territory, appeared for the appellant. The decision was given on Monday, January 6th, 1879. A petition for a rehearing was afterwards presented by the counsel for the appellant, with what effect is not known at this writing.

It will be perceived that the court, in sentencing Mr. Reynolds, exceeded the law. It sentenced him to imprisonment *with hard labor*. The statute limits the punishment to fine and imprisonment. The Counsel, in asking for a rehearing, state that all the authorities agree in saying it is an error to add *hard labor* to the punishment, if not provided for by law; and they refer for support of the petition to two or three of the more prominent ones. It is to be hoped that the Court will give heed to this petition, and grant the rehearing asked for. Blackstone,* upon this subject, says:

"And it is moreover one of the glories of our English law, that the "species, though not always the quantity or degree, of punishment is "*ascertained* for every offence; and that it is not left in the breast of any "judge, nor even of a jury, to alter that judgment, which the law has "beforehand ordained, for every subject alike, without respect of persons. "For, if judgments were to be the private opinions of the judge, men "would then be slaves to their magistrate; and would live in society with- "out knowing exactly the conditions and obligations which it lays them "under."

Certainly this Government cannot afford to punish the humblest of its citizens wrongfully. The Supreme Court, elevated as it is above all courts in the land and above all its citizens, is not so high that it can justly deny to the lowliest and most oppressed, even though accused of crime, his rights as a citizen, without a sacrifice of its own honor and dignity. It should be remembered that "one foul sentence does more "harm than many foul examples; for the last do but corrupt the stream, "while the former corrupteth the fountain."

In the decision upon this case by the Supreme Court of the United States, the assignments of error, as presented by Messrs. Biddle and Sheeks, when grouped, presented six questions. As four of these are

* Blackstone, pp. 377, 378.

altogether technical, I shall not allude to them. The discussion of the constitutional aspect of the case by the Court is confined to the fifth question, and, as it is my purpose to examine that only, I only publish in the appendix the fifth and sixth questions of the decision. Mr. Chief Justice Waite delivered the opinion of the Court.

In approaching the investigation which I propose of this decision and the foundation upon which it rests, I feel great diffidence. The Supreme Court of the United States is a tribunal towards which I have ever looked with respect and reverence. Its decisions are entitled to the greatest consideration. They carry with them the weight of great authority. Individually, the members of the Court occupy a high place in the public confidence and esteem. Their lives, and the events and actions of their lives, for many years, are before the world, and form a conspicuous part of the history of the country. United as they are in the capacity of a Supreme Court of this great nation, they form a judicial tribunal which is not surpassed, if equalled, in dignity by any other on earth. These considerations are sufficient to cause me to feel a delicacy in reviewing any decision made by that Court, and my embarrassment is not lessened by the fact that several of them are my personal friends, from whom I have received kindnesses, and to whom I feel under obligations. Nothing, therefore, but a high sense of duty could impel me to take up my pen and make public any criticism or review of their action. But in this case the great principle of religious liberty is at stake. My own rights, the rights of my co-religionists, the rights of men of every creed and of no creed, the rights of my posterity, and the posterity of every citizen of this great Republic, are stricken down by the Court's decision. Its effect is far-reaching, and, if unreversed, will be attended by most disastrous consequences to the people of this nation and their posterity. If there be one human right higher, dearer, and for which greater sacrifices should be made, than another, it is the right of conscience, the right involved in this decision. It may seem presumptuous in me to question the correctness of the doctrine advanced by the Supreme Court. Yet, before I get through with this investigation, I think I shall be able to show, with, as I hope, only becoming modesty and proper firmness, that their decision is extra judicial; that the law concerning which it was delivered not only violates the Constitution of the United States and is in direct opposition to the sentiments and views of the men who framed that instrument, but offends against the Divine law. High as is my respect for the Supreme tribunal of the land, my respect for the Constitution and my reverence for God are higher. I cannot assume for human laws and human decisions that which I assume for God's laws—that they are beyond question. To do so would be to claim for their fallible authors an infallibility which belongs only to the Creator. I cannot

exalt man to an equality with God. That the laws of Congress have not always been constitutional and perfect, that the decisions of the Supreme Court have not always been infallible, the history of the nation clearly establishes. It requires no great age, no venerable experience, to remind citizens of this fact; men of middle age have but to contrast the present with the past, which they can recollect, to convince themselves of it.

When this decision was rendered, I was disappointed. When I had the opportunity of reading it, my disappointment was increased. I had hoped that the Court would give to this question—one of the most important that has ever been submitted to it—the most calm, profound and unprejudiced attention; that they would examine it thoroughly and exhaustively, and render a decision that would be read with interest and delight by every lover of freedom and the rights of man. No grander opportunity was ever offered to a court to do this than the Reynolds case afforded. But one has only to read the document to perceive that the Court failed to grasp the magnitude of the question, or to rise to its proper conception. I venture to say that no constitutional lawyer—and in fact no layman who has given the questions involved in this case any consideration whatever—who takes pride in the reputation of the Court, can help having a feeling of regret in reading the decision. It is superficial, careless and immature. It reads more like the plea of an advocate than the well-considered, thoroughly weighed and ripe decision of great judges upon an important and long agitated constitutional question. Such a decision upon a case involving a few thousands of dollars, though open to dissent and perhaps censure, might be excused upon the plea of a pressure of current business; but upon a case of this magnitude, affecting, as it does, the rights of conscience and religious liberty of a large and important society, who form the bulk of the population of one Territory, and important communities in other Territories, far-reaching, too, in its effects upon those rights and that liberty in the nation at large, such treatment of the question is utterly out of keeping with the character of this Supreme earthly tribunal.

With the enormous amount of work the Court has to attend to it is not surprising that the Justices should largely avail themselves of the briefs of counsel in preparing their decisions upon the cases tried before them. The full justification for this can be found in the want of time to hunt up and compare authorities. It is not difficult to perceive that the brief of the Attorney-General in the Reynolds case was freely used. The references to human sacrifices and the burning of widows being claimed as a part of religion, as well as the general tone and argument of the decision, lead to this conclusion. The practices of the Thugs and the practice of Suttee was a part of the Attorney-General's argument, as I saw it reported. I am assured, by responsible parties with whom he con-

versed, that he claimed the decision as his own. I am relieved from embarrassment in reviewing this opinion by this statement.

Early in my life I was taught that the founders of our Government were raised up by the Almighty to perform the work which they accomplished. I was taught to look upon the experience which the colonies underwent in the suffering of wrongs, in the endurance of oppression, in the struggles for religious and political liberty, as a preparatory training to enable them to value, contend for and achieve independence. I was taught that the firmness, valor and undaunted cheerfulness, hope and confidence of Washington, and the heroic men who shared with him the perils of the battle-fields of the Revolution, the wisdom and skill and moral courage in council of the Adamses, Franklin, Jefferson and Madison, and the mighty patriots, their compeers, were due to the direct blessing and inspiration of Heaven bestowed upon them. I was taught to view the Declaration of Independence and the Constitution of the United States as instruments designed by the Almighty for the establishment and protection upon this land of the most perfect and happy liberty to which mankind could attain in this mortal existence. In stating in this manner that which I was taught, I but state that which all of my co-religionists who have been brought up in our faith have been taught. I only state, also, that which is a cherished belief with them and myself to this day. Imagine the disappointment, then, which we felt when we heard from the Supreme Court of the United States, which has the authority to pronounce upon what is constitutional and what is unconstitutional, that in our religious faith and practice we were not protected by the Constitution, but could be legally and constitutionally dishonored, stripped of our property, immured in prison and disfranchised for the practice of that which we believe the Lord had commanded us to obey! Had we been deceived? Were we and other people protected by the Constitution in our religious belief and opinions only, and not in actions springing from and prompted by that belief? Had Congress the right to interfere with religious practices?

Believing that the Lord had led the framers of the Constitution to make it sufficiently broad and comprehensive for all His purposes, and that He had commanded us to receive the old marriage practiced by the patriarchs, the decision of the Supreme Court placed us in a quandary. If, as is undoubtedly true, the Lord had a perfect knowledge of the Constitution and its powers and limits when He required us to obey the commandment referred to,* how came this decision of the Supreme Court? Certainly He had not left the charter of our liberties in so imperfect a condition that Congress could, by its authority, make a law by which we

* Revelation given July 13th, 1843.

should be fined, imprisoned and degraded for obeying Him. Such a thought was repugnant to every feeling of my nature. Was it possible, then, that the Supreme Court had made a wrong decision? Reluctant as I was to let this thought enter my mind, it was my only alternative. Here was the Supreme Court of the United States on one side and the Lord upon the other. One, the Supreme earthly tribunal, the other, the Supreme Ruler of Heaven and earth. There could be no hesitation in concluding which was right. But to merely assert it was unworthy of the cause and the tremendous issues involved. Proofs were needed. It is to produce these that I write these pages—to show the men of this nation, religious and irreligious, how comprehensive a Constitution we have; to show that under that glorious instrument the orthodox and the heterodox, the popular and the unpopular, the McCloskys, the Chapins, the Fotheringhams, the Simpsons, the Beechers, the Talmages, the Collyers, the Cooks, of every denomination, aye, even the worshipers of Pagan deities, the Ingersolls, and the "Mormons," have perfect liberty of worship, in faith and works, in every corner of this continent covered by the Constitution, *so long as their belief and practice do not interfere with the rights of their fellow-men.* And it is an extraordinary fact, that, to prove this broad statement, it is only necessary to refer to the same works from which the decision quotes, and upon which its conclusions are based! Not the least of the considerations which prompt me in this review, is that I desire that all the people of my faith may know that we have not been deceived in our ideas respecting the Constitution and our rights under it; that if we are to be stricken down, though I cannot believe we shall be, it shall not be in ignorance nor in doubt as to the wrongfulness of the blows from which we suffer; that our children may know that we fell contending for constitutional rights, liberty of conscience for ourselves and all others; and that they—in that event more fortunate than we—having a complete knowledge of the powers and liberty granted by the Constitution, may bear it aloft and make it effective, in fully protecting the freedom of conscience and rights of worship of the Catholic and the Protestant, the Jew and the Gentile, the Pagan and the Mohammedan, the Infidel and the Latter-day Saint.

CHAPTER I.

Views of Latter-day Saints respecting First Amendment to the Constitution.—Views of the U. S. Supreme Court.—The Virginia Declaration of Rights.—Mr. Madison's position respecting the extent of Religious Liberty.

THE first amendment to the Constitution is to the effect that "Congress shall make no law respecting an establishment of religion, "or prohibiting the free exercise thereof."

The Latter-day Saints, or "Mormons" as they are frequently called, who reside in Utah and the valleys contiguous thereto, have always maintained that their system of plural or patriarchal marriage, being a part of their religion, was shielded from legislative interference by the above amendment to the Constitution. Congress, disregarding this claim, enacted the statute which I have quoted on my first page. The Supreme Court, by this decision, decides that Congress has the power under the Constitution to do this. The Court proceeds to determine the question as to the constitutionality of the law, by asking, "What is the religious free- "dom which has been guaranteed?" This has been the question at issue since the passage of the law. It might be condensed into these words: What is religion? We claim that this doctrine, and the practice flowing from our belief in this doctrine, is religion. Congress has decided, and now the Court decides, that this is not religion. The issue is direct, well-defined, and easily understood. The grounds upon which the decision of the Court is based, I shall state as briefly as I can, and be absolutely fair. To the events of history mentioned by the Court, I shall only allude when necessary to make my points more clear.

We are told that the word "religion" is not defined in the Constitution. For its meaning, therefore, we are referred to the history of the times in the midst of which the provision passed. In the preamble of the Act "for establishing religious freedom," drafted by Mr. Jefferson, (and now found in 12 Hening's Stat., 84,) we are informed that religious freedom is defined. The following quotation from that preamble is then given: "That to suffer the civil magistrate to intrude his powers into the "field of opinion, and to restrain the profession or propagation of princi- "ples on supposition of their ill tendency, is a dangerous fallacy which at "once destroys all religious liberty." It is declared "that it is time enough "for the rightful purposes of civil government for its officers to interfere "when principles break out into overt acts against peace and good order." "In these two sentences is found the true distinction," the Court says, "between what properly belongs to the Church and what to the State."

Following this is a quotation from Jefferson's reply to an address to him from a committee of the Danbury Baptist Association, to the effect "that the legislative powers of the Government reach actions only, and "not opinions;" and that he "shall see with sincere satisfaction the "progress of those sentiments which tend to restore man to all his natural "rights, convinced he has no natural rights in opposition to his social "duties." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted, the Court says, almost as an authoritative declaration of the scope and effect of the first amendment to the Constitution.

It will be seen that Mr. Jefferson is relied upon by the Court as an authority upon this question of religious freedom. He framed the Virginia Act for establishing religious freedom. He advocated and approved of the first amendment to the Constitution. So confident is the Supreme Court that he knew all about the meaning, scope and effect of each of these that it quotes no other authority. We desire this to be remembered, as we shall have occasion hereafter to refer to Mr. Jefferson and his views. In one sentence the Court, from his sayings which it quotes, thus summarizes its conclusions:

"Congress was deprived of all legislative power over mere opinion, "but was left free to reach actions which were in violation of social duties, "or subversive of good order."

This Act for establishing religious freedom was not the first measure relating to religion enacted by the Virginia Assembly. Nine years before its passage the representatives of the people of Virginia, in convention assembled, adopted a "Declaration of Rights."* Mr. Madison was a member of that Convention. As he, no less than Mr. Jefferson, was an important actor in those stirring scenes, and took a leading part in securing freedom of conscience, it is indispensable, for the more perfect understanding of that great right, that we should learn his views and action upon it. If one man more than another can be credited with being the author of the Constitution of the United States, he is that man. This "Declaration of Rights" of Virginia was passed when men's minds were aflame with the spirit of liberty. The just rights of the people, the limits which should define properly constituted governments, were with them at the time the constant subjects of thought. Section 16 of that Declaration says:

"That religion, or the duty which we owe to our Creator, and the "manner of discharging it, can be directed only by reason and conviction, "not by force or violence, and therefore all men are equally entitled to the "free exercise of religion, according to the dictates of conscience; and that

* 9 Hening's Stat., pp. 109-111.

"it is the mutual duty of all to practice Christian forbearance, love and "charity towards each other."

Respecting this clause, we are informed by the biographer of Mr. Madison,* that it was drafted originally by Col. George Mason, but not in its present form. His draft contained the words, "All men should therefore "enjoy the fullest toleration in the exercise of religion, according to the "dictates of conscience, unpunished and unrestrained by the magistrate, "unless, under color of religion, any man disturb the peace, the happiness, "or the safety of society." It might be thought that such a well-guarded provision as this would not be objected to on account of it not being sufficiently liberal. The select committee having the subject in hand evidently thought it right, for they reported it without suggesting any amendment. But we are informed that to Mr. Madison there seemed to be an implication both dangerous and illogical in the use of the word *toleration*, as well as in the clause which admitted the restraining and punitive interposition of the civil magistrate in cases where the peace of society might be supposed to be endangered. Toleration might be used where a certain liberty of worship is granted, not of right but of grace. He was opposed to giving the civil magistrate the authority to interfere in cases where the peace of society might be alleged to be in danger of being disturbed under color of religion. He perceived that the liberality of the first part of the section might be impaired, if not annulled, in the hands of the civil authority by the construction that might be put upon the latter part. He was a modest man, he paid deference to age and experience. Col. Mason and other members of the committee possessed both. He was, therefore, reluctant to offer any suggestion of his own to the Convention. But he had a strong sense of duty, a profound love for religious freedom in its utmost latitude. He proposed an amendment which asserted the inherent and indefeasible right, by nature, to freedom of religion, and declared that "all men are equally entitled to the full "and free exercise of religion, according to the dictates of conscience." To close the door more effectually against the abuse of authority by the civil magistrate under the clause of exception drafted by Col. Mason, Mr. Madison's amendment added that "no man, or class of men, ought, "on account of religion, to be invested with peculiar emoluments or privi- "leges, nor subjected to any penalties or disabilities, unless, under color of "religion, the preservation of equal liberty and the existence of the State "are manifestly endangered."

Here we have Mr. Madison's exact idea as to the power of the civil magistrate, or the government, over religion. It is well to note it as we pass. *No man to be subjected, on account of religion, to any penalties or*

* 1 Rives' Madison, p. 138.

disabilities, unless, under color of religion, the preservation of equal liberty and the existence of the State are manifestly endangered. Here was a well-defined limit, beyond which Government could not pass without trespassing upon the rights of the citizen. His faith, his worship, his religious practices, as his conscience might dictate them to him, are his own. His fellow-man has no right to interfere with them. He is responsible for them to his Creator. Government has no authority to interfere with them, unless—mark the exception—*the preservation of equal liberty and the existence of the State are manifestly endangered.*

Mr. Madison's amendment to the first part of the clause was adopted. It stands now in the law in his language. The qualifying clause of Col. Mason, admitting the interposition of the civil magistrate in cases where the peace, happiness, or safety of society might be supposed to be in danger of being disturbed, was wholly omitted.

It was necessary to our purpose, before we touched upon the circumstances connected with the Act for establishing religious freedom, to which the Supreme Court alludes in the decision, that we should define Mr. Madison's position upon the great question of religious freedom. The "Declaration of Rights" preceded the "Act establishing religious freedom," and they both preceded the first amendment to the Constitution. The same spirit runs through these three invaluable declarations of rights. Jefferson and Madison and their associates were the framers and advocates of these guaranties of religious liberty, and the agents through whose action they became laws. Every word of theirs, therefore, upon this subject throws light upon the scope which they intended these guaranties should have. On this account we are gratified that the Supreme Court has expressed a willingness to accept their statements, particularly Jefferson's, as so authoritative that its decision, as to what is the religious freedom guaranteed, is based upon them.

CHAPTER II.

Memorial of the Hanover Presbytery and the Baptists, by Mr. Madison, for Religious Liberty.—Christianity itself not to be preferred to the exclusion of other Religions.—Plural Marriage as a Religious Ordinance protected by the Virginia Act establishing Religious Freedom.

WE now come to the Act establishing religious freedom. Howison, in his History of Virginia, says,* "At the very time when Jefferson "was embodying his views in definite form, a number of consecrated minds

* Vol. 2, p. 299.

"were at work on the same subject." Howison says it is doubtful whether Jefferson was a simple Deist, or a Unitarian; but he has no hesitation in saying that he rejected the atonement of Jesus and degraded him into a self-deceiver.* He admits that, though infidel in his opinions, he followed the highest reason in his views of religious liberty. There happened to be such a condition of affairs in Virginia at that time that the dissenters were glad to have Mr. Jefferson on their side and to work with him. They were persecuted, and they craved freedom. No less than five Memorials had been presented by the Presbytery of Hanover to the General Assembly. In these the relations of Church and State were discussed. They had an important influence in shaping the legislation respecting religious freedom. The Baptists also petitioned repeatedly upon the same subject. Their wishes found voice through Mr. Madison in the admirable Memorial which he drew up.

It is interesting to read these Memorials and to feel the earnest spirit in which they are penned. With a few alterations they would cover the Latter-day Saints' case almost entirely. They are much alike in tone. They are the cry of humanity, which is not peculiar to any age, race, tongue, or creed, wherever restrictions upon the rights of conscience exist, or attempts are made to enact them. The dissenters did not want a religion established by law. They wanted all denominations to be free. A few sentences from the Memorials of the Hanover Presbytery will show the view they entertained of the liberty of conscience, and they furnish evidence as to the intended breadth and scope of the Act establishing religious freedom. They say: "That every argument for civil liberty gains "additional strength when applied to liberty in concerns of religion, and "that there is no argument in favor of establishing the Christian religion "but what may be pleaded for establishing the tenets of Mahomet by those "who believe the Alcoran. * * * That they humbly repre- "sent that *the only proper objects of civil government are the happiness and "protection of men in the present state of existence, the security of the life, "liberty and property of the citizens, and to restrain the vicious and encour- "age the virtuous by wholesome laws,* equally extending to every individual; "but that the duty they owe their Creator, and the manner of discharging "it, can only be directed by reason and conviction, and is no where cogni- "zable but at the tribunal of the Universal Judge."†

"If the Assembly have a right to determine the preference between "Christianity and the other systems of religion that prevail in the world,

* This may be true respecting Jefferson at one period of his life, but he modified and revised these views very considerably at a later day, as a perusal of his correspondence will show.

† Virginia House of Delegates' Journal, pp. 32, 33.

"they may also, at a convenient time, give a preference to some favored "sect among Christians." *

I should like to give at length the able Memorial drawn up by Mr. Madison, but my want of space forbids. I can only give a summary which embodies the spirit of the whole document.

Quoting from the Bill of Rights of Virginia, as a fundamental and unalienable truth, "that religion, or the duty which we owe to the Creator, "and the manner of discharging it, can be directed only by reason and "conviction, not by force or violence," it argues that it must be left to the conviction and conscience of every man, and it is the right of every man to exercise it as these shall dictate; that this right is inalienable; that it is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to Him; that every man, on entering society, reserves his allegiance to the Governor of the Universe; and, consequently, no man's right can be abridged by the institution of civil society, and that religion is wholly exempt from its cognizance; hence it argues that if religion be exempt from the interference or authority of society at large, *a fortiori* it must be from that of the legislative body; that the rulers who are guilty of such an encroachment exceed the commission from which they derive their authority *and are tyrants;* that the people who submit to it are governed by laws made neither by themselves nor by an authority derived from them, *and are slaves;* that prudent jealousy in taking alarm at the first experiment on their liberties is held to be the first duty of citizens. The Memorial contains the following remarkable sentence: "Who do not see *that the same authority which can "establish Christianity in exclusion of all other religions, may establish with "the same ease, any particular sect of Christians, in exclusion of all other "sects?"*

In alluding to the idea contained in the Bill protested against, that the civil magistrate is a competent judge of religious truths, Mr. Madison declares it to be "an arrogant pretension, falsified by the extraor- "dinary opinion of rulers, in all ages and throughout the world." The Memorial, in describing the dreadful effects of religious proscription in the old world, and the happy effects of equal and complete liberty in America, says, if the bounds of religions should be contracted, there is no name known that will too severely reproach such folly. This important document closes by claiming that the equal right of every citizen to the free exercise of his religion according to the dictates of conscience, is held by the same tenure as all other rights; "either then," it says, "the will of the legislature is the only measure of their authority; "and that in the plenitude of this authority, they may sweep away all our

* 2 Howison's History of Virginia, p. 298.

"fundamental rights; or, that they are bound to leave this particular right "untouched."

The Act which these Memorials called into existence Mr. Madison speaks of * as "a permanent barrier against future attempts on the rights "of conscience, as declared in the great charter prefixed to the Constitution "of the State." At another time he said: † "The enacting clause passed "without a single alteration, and, I flatter myself, in this country "extinguished *forever that ambitious hope of making laws for the human "mind.*"

These Memorials ask for everything as to rights of conscience that I can desire. If Mr. Jefferson in framing, and the Assembly in passing, held the same views as the Hanover Presbytery and Mr. Madison express, then it is plain that patriarchal marriage, as a part of religion, is fully protected. It is evident from the language used that they considered every religious practice, whether baptism or circumcision, the worship of relics and images or the worship of the sun, the celibacy of priests and nuns or the plural marriages of Mohammedans, as all beyond the line of governmental interference, a line over which the legislature could not pass without transcending its powers. It was evidently a conceded point in the minds of the Presbytery and of Mr. Madison, and most likely in the minds of the men whom they addressed, that the Assembly had no right to prefer Christianity to any other system of religion that prevails in the world. All religions were to be left upon the same footing; none excluded, none preferred. All sects of Christians were to receive the same impartial treatment. I am aware that this is not the generally entertained idea to-day. But I shall prove, before I get through, that the advanced thinkers of America, the men who gave shape to the guarantees of religious freedom, entertained far broader and more comprehensive views respecting the rights of conscience than many would have us suppose they did.

Among the other systems of religion which prevail in the world, besides Christianity, are: Judaism, Buddhism, Mohammedanism, Brahminism, the *ism* of Confucius and the Sinto religion. Will it be denied that if a body of believers in any of these religions lived in this country they would not be protected in their religious practices, so long as they did not interfere with or injure their neighbors? I know that the Supreme Court says in this decision, "That, unless restricted by some form "of constitution, it is within the legitimate scope of the power of every "civil government to determine whether polygamy or monogamy shall be "the law of social life under its dominion." But I boldly assert, and am

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* Madison's Works, vol. 3, p. 526.

† Ibid, vol. 1, p. 216.

fully satisfied I can prove, that where plural marriage is a part of religion, the government is restricted by our Constitution from interfering with the practice. This can be inferred from the language of these Memorials; for, undoubtedly, if language means anything, they meant that Mohammedanism was not to be excluded any more than Christianity; that its believers under our Constitution and form of government were to be equally protected in their civil and religious rights with Christians. Many ardent and devoted Christians probably cannot bear the thought that the religion of the Redeemer should be brought into such a position as this. They view it as a degradation; and they would be shocked and distressed if they thought it would ever be brought to the test. But if we read the arguments of those days, and witness the true confidence which Christian men had in truth and its power, when left free and untrammeled, to cope with and conquer error, we shall be satisfied that such liberty as they were willing to grant was not dangerous. The Rev. Dr. Price, a clear and advanced thinker and writer, in his work on the American Revolution, published 1776, treats upon this subject with convincing arguments. As his writings embody the views of the men who thought as he did, a few extracts upon this subject will not be out of place here. Speaking of the United States, he said, "May Religion flourish. They "cannot be very great and happy if it does not. But let it be a better "religion than most of those which have been hitherto professed in the "world." After beautifully describing true religion, he says: "In a word, "let it be the genuine gospel of peace, lifting above the world, warming "the heart with the love of God and his creatures, and sustaining the for- "titude of good men by the assured hope of a future deliverance from "death, and an infinite reward in the *everlasting kingdom of our Lord and "Savior.*" This religion he was not afraid would ever be degraded or overcome, even if it did not have the aid of the civil power to help its progress. He closes his work by saying: "From the preceding observa- "tions it may be concluded that it is impossible I should not admire the "declaration of rights which forms the foundation of the Massachusetts' "constitution. * * * It is liberal beyond all example. I "should, however, have admired it more had it been more liberal, and the "words ALL MEN OF ALL RELIGIONS been substituted for the words *every "denomination of Christians.*" The small capitals and italics are his own.

CHAPTER III.

Mr. Jefferson and the Virginia Act establishing Religious Freedom.—The Jew and the Gentile, the Christian and the Mohammedan, the Hindoo and the Infidel comprehended within the mantle of its protection.—Protected in their mere opinions alone and not in their acts?—Locke would not exclude Pagan, Mohammedan or Jew from civil rights because of his Religion.—Liberality of Burlamaqui, Vattel, Charles II, and Blackstone respecting the Rights of Conscience.—Washington to the Army.—All Religious rites, ceremonies and practices, which do not interfere with the rights and liberty of others, equally protected.

I NOW turn to Mr. Jefferson. I wish my space would permit me to give the whole preamble which he wrote to the Act for establishing religious freedom. It so completely covers the whole subject that it scarcely leaves a thing to be desired. True, he uses the two sentences quoted in the decision, and in which, the Supreme Court says, is found the true distinction between what properly belongs to the Church and what to the State. But, happily for us, Mr. Jefferson himself has not left us to these two sentences to find out what he meant.

With all due respect to the honorable Supreme Court, I am nevertheless constrained to say that I choose to take what he has said himself in relation to this Act and its preamble, and his own definition as to what are the legitimate powers of Government, in preference to their interpretations of his language and views.

Mr. Jefferson wrote his autobiography. In that he mentions, with an evident feeling of satisfaction, the part he took in passing the Act upon which we are treating. He says:*

"The Bill for establishing religious freedom, the principle of which "had, to a certain degree, been enacted before, I had drawn in all the lati- "tude of reason and right. It still met with opposition; but, with some "mutilation in the preamble, it was finally passed; and a singular proposi- "tion proved that its protection of opinion was universal. Where the pre- "amble declares that coercion is a departure from the plan of the holy "author of our religion, an amendment was proposed, by inserting the "words 'Jesus Christ,' so that it should read, 'a departure from the plan "of Jesus Christ, the holy author of our religion;' the insertion was "rejected by a great majority, in proof that they meant to comprehend, "within the mantle of its protection, the Jew and the Gentile, the

* 1 Jefferson, p. 45.

"Christian and the Mohammedan, the Hindoo and Infidel of every "denomination."

As this is Mr. Jefferson's own writing, I accept the statement here made as indisputable. The decision of the Supreme Court attempts to prove that we are not protected in practicing plural marriage as a part of our religion, because it goes beyond the religious freedom which has been guaranteed. To sustain this idea it quotes Jefferson, and draws the inference from his language that Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties, or subversive of good order. My readers will perceive that in this extract, which I have taken from his autobiography, he uses the words: "And a singular proposition proved that its protec- "tion of opinion was universal." Here is the word "opinion" again, the same word which he used in the preamble, and which is quoted by the Supreme Court to sustain the idea that to this extent and no more are we protected in freedom of conscience by the Constitution. Can it be possible that any one will assert that when Mr. Jefferson states the Assembly "meant to comprehend, within the mantle of its protection, the Jew and "the Gentile, the Christian and Mohammedan, the Hindoo and the Infidel "of every denomination," he only intended them to be protected in their "mere opinions" and not in the acts of worship and obedience flowing from those opinions? If this were the extent of the freedom of conscience over which he and Madison and the patriots of that day rejoiced, and which has been the boast of Americans ever since, where is the ground for exultation? There can scarcely be a European writer found, even among the strongest advocates of the supreme authority of the sovereign prince in matters of religion, who is not as liberal as this. Two centuries ago John Locke* said:

"Those that are seditious, murderers, thieves, robbers, adulterers, "slanderers, &c., of whatsoever church, ought to be punished and sup- "pressed. But those whose doctrine is peaceable, and whose manners are "pure and blameless, ought to be upon equal terms with their fellow- "subjects. Thus, if solemn assemblies, observations of festivals, public "worship, be permitted to any sort of professors, all these things ought to "be permitted to the Presbyterians, Independents, Anabaptists, Arme- "nians, Quakers, and others with the same liberty. Nay, if we may openly "speak the truth, and as becomes one man to another, neither Pagan, nor "Mohammedan, nor Jew, ought to be excluded from the civil rights of "the commonwealth, because of his religion. The Gospel commands no "such thing."

Burlamaqui says that "since religion, therefore, has so much influ-

* Vol. 6, p. 52.

"ence over the happiness or misery of society, who can doubt but it is sub-"ject to the direction of the sovereign?"* He claims for the sovereign the utmost authority in matters of religion. Yet even he admits that the sovereign cannot lawfully assume to himself an empire over consciences. Nature and the divine laws, he says, are equally contrary to this pretension. He calls it both absurd and impious to endeavor to constrain consciences.

Vattel says† that the sovereign must have a right to examine the doctrines of religion, and to point out what is to be taught, and what is to be suppressed in silence. This writer thinks the justification for this is to be found in his right to take care that nothing contrary to the welfare and safety of the State be introduced into religion. Yet even he is not dead to all liberal sentiments concerning freedom of conscience. He says:‡

"Let interested priests declaim! They would not trample under "foot the laws of humanity, and those of God himself, to make their doc-"trines triumph, if it were not for the foundation on which are erected "their opulence, luxury and power. Do but crush the spirit of persecu-"tion—punish severely whoever shall dare to disturb others on account "of their creed, and you will see all sects living in peace in this common "country, and ambitious of producing good citizens."

As far back as 1663 Rhode Island obtained a charter from Charles II of England, in which it is provided, "That no person within the said "colony at any time hereafter shall be any wise molested, punished, dis-"quieted, or called in question for any differences in opinion in matters of "religion, who do not actually disturb the civil peace of our said colony, "but all and every person and persons may from time to time, and at all "times hereafter, freely and fully have and enjoy his and their own judg-"ments and consciences in matters of religious concernments, they behav-"ing themselves peaceably and quietly, and not using this liberty to licen-"tiousness and profaneness, nor to the civil injury nor outward disturbance "of others."§

Blackstone also, sturdy old monarchist as he was, who defended the action of the civil magistrate in not suffering dissenters in religion to hold office,‖ said that "if ever the laws of God and men are at variance, "the former are to be obeyed in derogation of the latter;¶ that the law of "God is, under all circumstances, superior in obligation to that of man."

"There were brave men before Agamemnon."

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* Burlamaqui, pt. 3, chap. 3, sec. 9.
† Vattel, B. 1, chap. 12, sec. 139.
‡ Ibid, sec. 23.
§ Walsh's Appeal, p. 429 (note to p. 48).
‖ 4 Black., p. 52.
¶ 1 Black. Com.,16th ed., 58, N. (6).

Many advanced thinkers presented liberal theories and ideas long before the revolutionary fathers came upon the stage. But the high privilege was reserved for the founders of this Government to give to these theories practical effect. To banish forever from the land "the impious "presumption of legislators and rulers, civil as well as ecclesiastical, who "being themselves but fallible and uninspired men, have assumed dominion "over the faith of others, setting up their own opinions and modes of "thinking as the only true and infallible."* They had the great honor of laying the foundation of a system of government under which universal liberty could be enjoyed. The character of this government is well described by Washington, when announcing the treaty of peace to the army. "Happy," said he, "thrice happy shall they be pronounced here-"after, who shall have contributed anything, who shall have performed "even the meanest office in erecting this stupendous fabric and empire on "the broad basis of independency, who shall have assisted in protecting "the rights of human nature and establishing an asylum for the poor and "oppressed *of all nations and religions.*"

Mark the expression, "For the poor and oppressed *of all nations and "religions.*" How much it resembles in its breadth and comprehensiveness the statement of Jefferson, which I quote from his autobiography! When Jefferson said that the Act establishing religious freedom "compre-"hended, within the mantle of its protection, the Jew and the Gentile, the "Christian and the Mohammedan, the Hindoo and the Infidel of every "denomination," he undoubtedly meant that this protection should be of the broadest possible character. He meant that the civil government should have no more right to interfere with the circumcision of the child of the Jew, than the sprinkling of the infant of the Christian — with the celibacy, the auricular confession, the reverence for relics and images, the transubstantiation, and the celebration of mass of the Catholic Church, than the plain, unceremonious and spirit-moving service of the Quakers —with the dancing of the Dervishes, than the "falling power" of the Methodist Ranters—with the immersion of the Baptists, than the prayer-book service of the Episcopalians — with the patriarchal marriage or endowments of the Latter-day Saints, than the non-marriage of the Shakers, or the *seances* of the Spiritualists — with the fantasies of the Hindoo, than with the pilgrimages and domestic relations of the Mohammedans. Each was to be free to worship God in his own way. An enthusiastic, devoted revivalist, like Moody, or an irreligious iconoclast, like Ingersoll, can each do what he conceives to be his duty, prompted by the dictates of his conscience, in perfect liberty, and under no restraint, except this, that he cannot injure any one in person, property,

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* Preamble to Act establishing Religious Freedom, 12 Hening's Stat., 84.

or good name* without being amenable to the civil law. Centuries ago Justinian stated,† as the whole doctrine of law, "That we should live "honestly, should hurt nobody, and should render to every one his due."‡ "Who, then, art thou, vain dust and ashes! by whatever name thou art "called, whether a king, a bishop, a church, or a state, a parliament or "anything else, that obtrudest thine insignificance between the soul of man "and his Maker? Mind thine own concerns. If he believes not as thou "believest, it is a proof that thou believest not as he believeth, and there is "no earthly power can determine between you."

CHAPTER IV.

Jefferson's own definition as to the Legitimate Powers of Government in Religious affairs.—To extend to such acts only as are injurious to others.—Liberty of Opinion and Practice an Indefeasible Right.—Agreement of Jefferson and Madison as to the Rights of Conscience and bounds of Religious Liberty.—Jefferson condemned for giving Paganism and Mohammedanism the same Religious Liberty and Protection as Christianity.—Mistaken View by the United States Supreme Court of the scope and effect of Jefferson's law.—Religious Liberty in Rhode Island two hundred years ago.

I HAVE said that I chose to take Thomas Jefferson's own definition as to what are the legitimate powers of the Government, in preference to the interpretations of his language and views by the decision which I am examining. In his notes on Virginia§ he says: "The "rights of conscience we never submitted, we could not submit. We are "answerable for them to our God. The legitimate powers of government "extend to such actions only as are injurious to others. * * * "Constraint may make him worse by making him a hypocrite, but will "never make him a truer man. It may fix him obstinately in his errors, "but will not cure them. Reason and free enquiry are the only effectual "agents against error."

Here, I may say, what the decision says respecting other expressions of his—"here is found the true distinction between what belongs to the "Church and what to the State." It does not conflict in the least with

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* Price's Am. Rev. p. 46.
† Instit. 1, 1, 3.
‡ Blackstone, vol. 1, p. 40.
§ Query XVII, p. 169.

the quotation of Jefferson's words in the decision respecting "overt acts "against peace and good order," and "natural right" and "social duties." But it makes them more clear. It agrees with the three precepts of Justinian given above. Liberty, then, not of mere opinion alone, but religious liberty of practice, is my natural and indefeasible right,* and with this neither the legislature nor any branch of the civil power can legitimately interfere. I am at full liberty to discharge the duty I owe to my Creator in my own way, to render Him the homage and obedience which He may command, or which my conscience may dictate. If I am convinced that He has commanded His people, of whom I may hope I am one, to obey the principle of patriarchal marriage as His ancient servants did, who has the right, legitimately, to interpose, and say I shall not obey that command? If I deem it necessary to my eternal happiness, if I am convinced that such an act will please my Creator, and that if I do not obey the command I cannot attain to that exaltation, in comparison with which the world and all its honor, power, and glory, and my own life in it, are but of trifling value, who will stand up in the face of heaven, and say I shall not do this? The women of the Church, to which I have the honor to belong, firmly believe that "the man is not without the woman "nor the woman without the man in the Lord;" they believe that it is God's design and command that they should be married *here*, for time and for all eternity; because in the resurrection there shall be no marrying nor giving in marriage. Who shall say that they shall not thus marry? Can we in the great day of the Lord Almighty lay the blame for our disobedience upon a Congress or a Supreme Court of the United States?

According to Jefferson's definition of the rights of conscience guaranteed by the Constitution, "to such actions only as are injurious to "others" were the legitimate powers of Government to extend.

Madison held the same view, as I have shown by quoting the amendment proposed by him in the Assembly of Virginia, and by extracts from his Memorial. He defines the bounds of religious liberty with great exactness in a letter to Edward Livingstone,† where he says, "I observe with much pleasure the view you have taken of the immunity "of religion from civil jurisdiction in every case where it does not "trespass on private right or the public peace."

The Hanover Presbytery define the proper objects of civil government to be, "The happiness and protection of men, the security of the "life, liberty, and property of the citizens."

Tried by these rules as to the powers of the civil government, the

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* 1 Black. Com., p. 41.

† 3 Mad. Writ., p. 24.

Latter-day Saints stand on an impregnable and unyielding rock. Our actions do not injure others. We do not trespass on private right or the public peace. We do not interfere with the happiness of our fellow citizens, or with their lives, liberty and property. Neither the preservation of equal liberty nor the existence of the State is endangered by us. Our examples are in favor of virtue and morality. Vice is frowned upon and punished. In the practice of our religion, then, we are over the line, beyond which, according to the highest authority, the civil power cannot go. Napoleon said, "My dominion ends where that of conscience begins." There is a fine sentiment of natural justice in this, which Congress and the Supreme Court would do well to act upon in the treatment of this question.

To still further prove that Jefferson's Act for establishing religious freedom was thought by others to be as broad and comprehensive as he himself described it to be, I quote from Dr. Hawks' Ecclesiastical History of the United States.* Because of his efforts to secure the passage of this Act, this writer accuses Jefferson "of aiming a blow at "Christianity itself." He says the Act "was viewed by many as utterly "subversive, in its declarations, of the Christian religion, and called forth "at the time [1785] the severe animadversions of some who still "reverenced the faith of the Apostles." After describing the steps which led to the passage of this Act and giving its text, Dr. Hawks thus alludes to Jefferson: "There is an air of self-satisfaction with which the "author of this law records the fact of his having prepared it, which "leaves no doubt that in the review of his political career, his mind dwelt "with peculiar complacency upon this incident of his life. He informs us "that the law was 'drawn in all the latitude of reason and right;' that it "met with some opposition, but finally passed; and in the spirit of exulta-"tion, which he cannot conceal at the success of his effort to degrade "Christianity to a level with the creed of Mecca, he proceeds to relate "with approbation a circumstance clearly indicative of his design to "heap dishonor upon the faith of Christians. We are informed by him "that an amendment was proposed to the preamble by the insertion of "the name of our Savior before the words, 'The holy Author of our "'religion;' this could at most have had no other effect upon the enacting "clause, but that of granting the utmost freedom to all denominations "*professing to own and worship Christ*, without affording undue preference "to any; and against this, it would be unreasonable to object: certain it is, "that more than this had never been asked by any religious denomina-"tion in Virginia, in any petition presented against the church. The "public, therefore, would have been satisfied with such an amendment; "the proposed alteration, however, was rejected, and it is made the sub-

* Vol. 2, p. 174.

"ject of triumph that the law was left, in the words of its author, 'to "'comprehend within the mantle of its protection, the Jew and Gentile, "'the Christian and Mohammedan, the Hindoo and Infidel of every "'denomination.' That these various classes should have been protected "both in person and property, is obviously the dictate of justice, of "humanity, and of enlightened policy, but it surely was not necessary in 'securing to them such protection, to degrade, not the establishment, *but "Christianity itself* to a level with the voluptuousness of Mohammed, or "the worship of Juggernaut."

The reverend Doctor would have been satisfied to have had all these disagreeable people protected in person and property,—they might have indulged in "mere opinion" also,—but his complaint against Jefferson was hat these obnoxious religions, the voluptuousness of Mohammed and the worship of Juggernaut were to have the same religious liberty as Christianity and were to be protected in their practice equally with it.

Having shown that the Supreme Court, in its decision, has taken a very limited—and can I not say mistaken?—view of the scope and effect of this law, and consequently of the amendment to the Constitution, under which we claim protection, I might rest the case here, for the decision admits that the first amendment to the Constitution was at least as broad as the Virginia Act establishing religious freedom. But I prefer to add proof to proof, as to the breadth and liberal comprehensiveness of the glorious Constitution under which we live. Before entering, however, upon that branch of this subject, I shall refer again to the Rhode Island liberty of conscience, and when I say this, I mean liberty both of opinion and action, without which real liberty does not exist. A question arose as to whether the Roman Catholics were excepted from privileges under an old ordinance of the Rhode Island Assembly of 1663. Hon. James Burrill, Jr., the distinguished Senator from that State in the Federal Congress, jealous for the honor and credit of Roger Williams, as the earliest apostle of *unlimited* toleration, solicited Hon. Samuel Eddy, the Secretary of State of Rhode Island, to make research into her records, with a view to the solution of the question. Mr. Eddy had been Secretary from 1797 to 1819. He was then elected Representative to Congress. He was highly esteemed, and enjoyed the fullest confidence of all who knew him. He found that a militia law, passed May, 1677, concluded with these words: "And that no person "inhabiting within this jurisdiction shall be in any wise molested, "punished, disquieted or called in question for any difference in opinion "in matters of religion, who do not actually disturb the civil peace of "this colony." *

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* Walsh's Ap., p. 431. (Note C to p. 48.)

This was two hundred years ago—one hundred and one years before our Declaration of Independence! "Mormon" as I am, I could live under such a law as that. I never, to my knowledge, disturbed the civil peace of any body. But how that law stands out in contrast with the law of Congress of July 1st, 1862!

I cannot quote from other laws for want of space, but I give the concluding paragraph of Mr. Eddy's letter:

"There is one trait," says he, "in the laws of the first settlers of this "colony, which places them, as advocates for the equal rights of all men "in matters of religion, on an elevation above their contemporaries. The "liberality of the most liberal of the latter is confined to *Christians, "believers in Jesus' holy Church;** that of the former is extended to all "men of civil conversation, without regard to their opinions, whether "Christians or Jews, believers in Moses, or Jesus, or Mohammed, or neither. "The *life only*, being of competent estates, furnished to the former "evidence of the fitness to be freemen. Chalmers justly contends for the "equal rights of the Roman Catholics with other Christians, and he ought, "for the same reasons, to have contended for the equal rights of Jews, "Mohammedans and all others, whether believers or not believers; for "their natural rights are certainly equal." †

CHAPTER V.

Restrictions upon Religious Liberty in the Colonies.—Debates upon the adoption of the Constitution of the United States.—In Virginia, Massachusetts, and North Carolina.—No one to be excluded from National Trusts because of any Religion or the want of any Religion.—Shall Pagans, Deists, and Mohammedans obtain office?—How is it possible to exclude them?—Can be elected President or other high officer in one of two cases only.—Papists and Mohammedans may occupy the President's chair.—Nothing against this.

I NOW turn my attention to the Constitution of the United States itself. And for the proper understanding and meaning of its provisions, and the extent of the religious liberty to be enjoyed under it, to nowhere, as the Supreme Court says, can we more appropriately go than to the history of the times in which it was adopted. My space will not permit

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* Chalmers, 213, 215, 218, 235.

† Walsh's Ap., p. 434. (NOTE C, p. 48.)

me to give, with the fullness which I would like, the debates upon this important question of religious liberty when the Constitution and its amendments came up in the States for debate upon its adoption. Religious intolerance was quite general, and popular sentiment desired to relieve itself from its thraldom. The adoption of the first amendment to the Constitution was an intimation to the world that in free America the inquisition over the rights of conscience was forever ended. The States had been released from the political tyranny of the mother country; by this amendment they were released from the religious traditions, the soul-crushing, the body-destroying laws and practices in religious matters of the old world. The new Republic turned her back upon all these, and, led and inspired by the Almighty, she swept away every restriction and oppressive enactment that could in the least prevent her from becoming, as Washington said, "an asylum for the poor and "oppressed of all nations and religions." This flag of political and universal religious liberty was unfurled to the world. This action was the more remarkable in view of what Hildreth says, that the public exercise of the Catholic religion was illegal in most or all of the colonies, excepting Rhode Island, Pennsylvania and Delaware, Catholic priests being liable, in Massachusetts and New York, to perpetual imprisonment, or even death.* In New Hampshire, New Jersey, North Carolina, South Carolina and Georgia, the chief officers of the State were required to be Protestants. In Massachusetts and Maryland all office-holders must declare their belief in the Christian religion; in South Carolina they must also believe in a future state of rewards and punishments; in North Carolina and Pennsylvania they were required to acknowledge the inspiration of the Old and New Testaments; and in Delaware, to believe in the doctrine of the Trinity.† It will be seen from this hasty review that, though the harshness of former times might not exist, religious bigotry and intolerance were by no means extinct. The prejudices against Catholicism were deep-rooted. These, however, had been greatly softened by the French alliance.

I thus describe, though almost too briefly, the condition of religious liberty as it existed in the colonies, because it is necessary, in order to appreciate the full significance of the discussion which took place upon this question in the debates upon the Constitution. In the debate on the adoption of the Constitution in the Virginia convention there was strong opposition, led especially by Patrick Henry. Among other remarks made during the course of the debate, we find the following by Mr. Randolph: "It has been said that if the exclusion of the religious test were

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* Hildreth Hist. of the U. S. first ser., vol. 3.

† Ibid.

"an exception from the general power of Congress, the power over "religion would remain. I inform those who are of this opinion, that no "power is given expressly to Congress over religion. * * * "The Constitution puts all sects upon the same footing. A man of abili- "ties and character of any sect whatever, may be admitted to any office "or public trust under the United States. * * * How "many sects will be in Congress! And there are now so many in the "United States, that they will prevent the establishment of any one sect, "in prejudice to the rest, and will forever oppose all attempts to infringe "religious liberty. If such an attempt be made, will not the alarm be "sounded throughout America? If Congress should be as wicked as we "are foretold they will be, they would not run the risk of exciting the "resentment of all, or most, of the religious sects in America."

Later in the debate* Mr. Randolph, referring to the speech of Mr. Henry, said: "He has added religion to the objects endangered in his "conception. Is there any power given over it? Let it be pointed out. "* * * No part of the Constitution, even if strictly construed, "will justify a conclusion that the general government can take away or "impair the freedom of religion."

In the debate in the Massachusetts convention the subject of religion came up, and I select a few of the more prominent remarks. Mr. Singletary said, "We were giving up all our privileges, as there was no pro- "vision that men in power should have any *religion;* and though he "hoped to see Christians, yet, by the Constitution, a Papist, or an Infidel, "was as eligible as they. It had been said that men had not degener- "ated; he did not think that men were better now than when men after "God's own heart did wickedly. He thought in this instance we were "giving great power to we know not whom."

Later in the debate Rev. Mr. Shute† said: "In this great and "extensive empire, there is and will be a great variety of sentiments in "religion among its inhabitants. Upon the plan of a religious test, the "question, I think, must be, who shall be excluded from national trusts? "Whatever answer bigotry may suggest, the dictates of candor and "equity, I conceive, will be, *None.* Far from limiting my charity and "confidence to men of my own denomination in religion, I suppose, and I "believe, sir, that there are worthy characters among men of every "denomination—among the Quakers, the Baptists, the Church of "England, the Papists, and even those who have no other guide, in the "way to virtue and heaven, than the dictates of natural religion. I must "therefore think, sir, that the proposed plan of government, in this par-

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* Page 649.

† Page 118.

"ticular, is wisely constructed; that, as all have an equal claim to the "blessings of the government under which they live, and which they sup- "port, so none should be excluded from them for being of any particular "denomination in religion. The presumption is, that the eyes of the "people will be upon the faithful in the land; and, from a regard to their "own safety, they will choose for their rulers men of known abilities, "of known probity, of good moral characters."

In the debate in the North Carolina convention, there was consid- erable discussion on the subject of the religious amendments to the Con- stitution. Mr. Henry Abbott said: "Some are afraid, Mr. Chairman, that, "should the Constitution be received, they would be deprived of the privi- "lege of worshipping God according to their consciences, which would be "taking from them a benefit they enjoy under the present Constitution. "They wish to know if their religious and civil liberties will be secured "under this system, or whether the general government may not make "laws infringing their religious liberties. The worthy member from "Edenton mentioned sundry political reasons why treaties should be the "supreme law of the land. It is feared, by some people, that, by the "power of making treaties, they might make a treaty engaging with "foreign powers to adopt the Roman Catholic religion in the United "States, which would prevent the people from worshipping God according "to their consciences. The worthy member from Halifax has in some "measure satisfied my mind on this subject. But others may be dissatis- "fied. Many wish to know what *religion* shall be established. I believe "a majority of the community are Presbyterians. I am, for my part, "against any exclusive establishment; but if there were any, I would "prefer the Episcopal. The exclusion of religious tests is by many thought "dangerous and impolitic. They suppose that if there be no religious test "required, Pagans, Deists, and Mohammedans might obtain offices among "us, and that the Senators and Representatives might all be Pagans. "Every person employed by the general and state governments is to "take an oath to support the former. Some are desirous to know how "and by whom they are to swear, since no religious tests are required,— "whether they are to swear by Jupiter, Juno, Minerva, Proserpine or "Pluto. We ought to be suspicious of our liberties. We have felt the "effects of oppressive measures, and know the happy consequences of "being jealous of our rights. I would be glad if some gentleman would "endeavor to obviate these objections, in order to satisfy the religious part "of the society. Could I be convinced that the objections were well "founded, I would then declare myself against the Constitution."

In reply Mr. Iredell said: "I consider the clause under considera- "tion as one of the strongest proofs that could be adduced that it was "the intention of those who formed this system to establish a general

"religious liberty in America. Were we to judge from the examples of "religious tests in other countries, we should be persuaded that they do not "answer the purpose for which they are intended. * * * Is "there any power given to Congress in matters of religion? Can they pass "a single act to impair our religious liberties? If they could, it would be a "just cause of alarm. If they could, sir, no man would have more horror "against it than myself. Happily, no sect here is superior to another. As "long as this is the case, we shall be free from those persecutions and "distractions with which other countries have been torn. If any future "Congress shall pass an act concerning the religion of the country, it "would be an act which they are not authorized to pass, by the Constitu- "tion, and which the people would not obey. * * * But it "is objected that the people of America may perhaps choose representa- "tives who have no religion at all, and that Pagans and Mohammedans "may be admitted into offices. But how is it possible to exclude any set "of men, without taking away that principle of religious freedom which "we ourselves so warmly contend for?"

At a later period in the debate Governor Johnston said: "True "religion is derived from a much higher source than human law. When "any attempt is made, by any government, to restrain men's consciences, no "good consequence can possibly follow. It is apprehended that Jews, "Mohammedans, Pagans, etc., may be elected to high offices under the "government of the United States. Those who are Mohammedans, or any "others who are not professors of the Christian religion, can never be "elected to the office of President, or other high office, but in one of "two cases. First, if the people of America lay aside the Christian "religion altogether, it may happen. Should this unfortunately take "place, the people will choose such men as think as they do themselves. "Another case is, if any persons of such descriptions should, notwithstand- "ing their religion, acquire the confidence and esteem of the people of "America by their good conduct and practice of virtue, they may be "chosen. I leave it to gentlemen's candor to judge what probability "there is of the people choosing men of different sentiments from them- "selves."

In the progress of the debate Mr. Spaight said: "As to the subject "of religion, I thought what had been said would fully satisfy that gen- "tleman and every other. No power is given to the general government "to interfere with it at all. Any act of Congress on this subject would "be a usurpation. No sect is preferred to another. Every man has a "right to worship the Supreme Being in the manner he thinks proper. "No test is required. All men of equal capacity and integrity are eligible "to offices. Temporal violence might make mankind wicked, but never "religious. A test would enable the prevailing sect to persecute the rest.

"I do not suppose an infidel, or any such person, will ever be chosen to "any office, unless the people themselves be of the same opinion."

Mr. Wilson wished that the Constitution had excluded Popish priests from office. As there was no test required, and nothing to govern them but honor, he said that when their interest clashed with their honor, the latter would fly before the former.

Mr. Lancaster, speaking of the religious question, said: "As to a "religious test, had the article which excludes it provided none but what "had been in the States heretofore, I would not have objected to it. It "would secure religion. Religious liberty ought to be provided for. I "acquiesce with the gentleman, who spoke, on this point, my sentiments "better than I could have done myself. For my part, in reviewing the "qualifications necessary for a President, I did not suppose that the Pope "would occupy the President's chair. But let us remember that we form "a government for millions not yet in existence. I have not the art of "divination. In the course of four or five hundred years, I do not know "how it will work. This is most certain, that Papists may occupy that "chair, and Mohammedans may take it. I see nothing against it."

CHAPTER VI.

Bigamy punishable with death.—But not applicable to Patriarchal Marriage.—Objection in New England to the Constitution was it opened a door for Jews, Turks and Infidels.—Asiatic religions being protected, the Patriarchs, were they here, would also have liberty of action.—The exemption of Latter-day Saints from punishment would not introduce new element into criminal law. — The crime of Bigamy totally unlike Patriarchal Marriage. — Sir Samuel Romilly on Bigamy.—Unfair statement to say "Mormons" desire, because of religious liberty, to violate law, for the violation of which, others, not of their religion, are punished.—Law of 1862 enacted for "Mormons" only.—No attempt to enforce it against others.

BY this time my readers who have accompanied me will perceive, I hope, how much broader a meaning the first amendment of the Constitution has than the decision of the Supreme Court would give to it. With such a Constitution how can any man's religion be made a crime? If Mohammedans, who do not believe in Jesus Christ as the Redeemer, are protected in their religion, and in their plural marriage as a part of that religion, surely the Latter-day Saints, who believe in

Jesus as the Savior, can claim protection for their patriarchal marriage when such marriage is an ordinance of their religion.

This brings me to another point in the decision, upon which great stress is laid by the Court. It is shown that polygamy was at one time punishable with death in England, and that this statute was re-enacted in the colonies. In Virginia it was re-enacted after the Act for establishing religious freedom had become a law. From this, what the Supreme Court calls, significant fact, the conclusion is drawn that "it is impossible to believe that the constitutional guaranty of "religious freedom was intended to prohibit legislation in respect to "this most important feature of social life." The Court starts out with the idea that plural marriage cannot be a religious duty, and it maintains that idea throughout. It is determined that it shall not be a part of religion; for the moment it admits that it may be a religious ordinance, duty or practice, the whole foundation for its decision, and for the action of Congress, which it justifies, is remorselessly swept away. But this whole line of argument is fallacious. Plural marriage, as practiced by the Latter-day Saints, does not originate in a crotchet respecting social duty or social life. It is a religious duty and obligation of the most sacred character. Men take upon them the responsibility and care of wives and children, because they believe God has commanded them so to do. It is not lust, self-ease, self-indulgence or selfishness which prompts them to marry; for all these can be better gratified by conforming to the custom of the world.

I shall show hereafter that a wide distinction exists between the crime of bigamy or polygamy, which the statute of James and of Virginia was meant to punish, and the patriarchal marriage of the Latter-day Saints, or even the marriages of Mohammedans and other Asiatics. If they were the same in every respect I should be willing to concede that there might be some significance in the fact that this statute was enacted after the passage of the Act establishing religious freedom. But they are as unlike as seduction or adultery and lawful marriage. Can it be supposed for a moment that Jefferson who framed, and the men who voted for, the Act establishing religious freedom, saw no difference between the act of a corrupt, heartless deceiver, such as the statute against bigamy punished, and the marriage of the Jewish patriarchs? When he said that the Assembly meant to comprehend within the mantle of the protection of the law, the Jew and the Gentile, the Christian and the Mohammedan, the Hindoo and the Infidel of every denomination, can it be possible that he did not think that mantle large enough to cover the patriarchal marriages of the Bible? After reading the discussion of the religious liberty guaranteed by the Constitution of the United States and its amendments, which I have given, can any one sup-

pose that those who framed and those who adopted the first amendment, did not look upon it as sufficiently broad and liberal to suffer a community, comprised of such men as Abraham, Jacob, Moses, Gideon, Elkanah, David, Solomon, and their descendants, to live in a society by themselves? The debates show that not only were obnoxious sects then in existence to be protected, but the men without religion, and the men of Pagan religions, and the followers of Mohammed, were to dwell in safety under the protection of the Constitution. They even contemplated the possibility of their electing men of their faith to Congress and to other positions of responsibility. The pertinent question is asked: "How is it possible to exclude any set of men, without taking away that "principle of religious freedom which we ourselves so warmly contend "for?" Madison, writing to Jefferson,* said: "One of the objections in "New England was, that the Constitution, by prohibiting religious tests, "opened a door for Jews, Turks and Infidels." Yet, though this was an objection—and to the people of New England, with their positive views concerning religion, it must have been a strong one—the Constitution and its amendments were adopted. What would the men of that day have thought, had they been told that Congress would pass a law, and the United States Supreme Court would uphold its constitutionality, by which Abraham, the Friend of God, to whose bosom many of them hoped and prayed they would go when they died, could, if he were here, living in one of the Territories, be sent to the penitentiary for five years and be made to pay a fine of five hundred dollars? Or that Jacob, the names of whose sons, which his four wives bore to him, are to be on the gates of the New Jerusalem, into which city none shall enter but they who are written in the Lamb's Book of Life,† could, if he were here, be fined, immured in prison and punished at hard labor for fathering those sons? Why, the bare mention of such a proceeding is enough to make the bones of Thomas Jefferson rattle in their coffin! He may have thought the practice of patriarchal marriage unsuited for present civilization; but he contended for, and got made, a mantle of religious freedom large enough to cover those who might arise and believe in and practice such a system of marriage as a part of their religion, as well as the Christian and the Jew, the Mohammedan and the Parsee, and all the Infidels of every kind. Under perfect religious freedom he tells us‡ "if "a sect arises, whose tenets would subvert morals, good sense has fair play, "and reasons and laughs it out of doors, without suffering the State to be "troubled with it."

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* Tucker's Life of Jeff., vol. 1, p. 278.

† Revelations, xxi, 12, 27.

‡ Notes on Va., Query XVII.

After expressing the opinion that the law of 1862 enacted against bigamy is within the legislative power of Congress, the Supreme Court says, that if those who make polygamy a part of their religion are excepted from its operation, it would be introducing a new element into criminal law. Those who do not make it a part of their religious belief would be found guilty and punished, while those who do, must be acquitted and go free. This has the appearance of a judicial difficulty. The proposition, as thus presented, strikes a person who has not thought upon the subject, and who does not understand it, as an unfair and unreasonable exemption for people to claim on account of religion. If people are punished for bigamy in other places, why should its practice be allowed in Utah under the claim of religion? Now, what well-informed man is there in this country who does not know that between the plural marriage of the people of Utah and the crime called bigamy, there is as radical a difference as there is between a silver dollar of the legal weight and fineness and a bogus dollar? The crime of bigamy, as usually committed, is a wrong of the most grave and damning character. A man marries a woman; he afterwards deserts her and marries another. From the first woman he conceals his intention to marry again. From the second he conceals the fact that he already has a wife. Both are wronged, both are deceived, and society is outraged. Such a man is a base wretch. He imposes upon female innocence, breaks the hearts and destroys the happiness of his victims, and inflicts upon them cruel, and in many cases, irreparable wrongs. Such a man deserves punishment.*

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* In the Appendix to Sir Samuel Romilly's Tract, entitled "Observations on "the Criminal Law of England," (note m.) are the following very judicious observations on this offence:

"The crime of bigamy comprehends two species of offences, differing greatly "from each other in their character and effects, and in their degree of moral "guilt; and the circumstances which mark the distinctions between these differ-"ent offences are clear and unequivocal. If the atrocity of a crime is to be "measured by the extent of the wrong done to the person who is the victim of "it, few crimes can be more atrocious than that of a married man, who, by repre-"senting himself to be a bachelor, prevails on a modest woman to become his "wife. He possesses himself by fraud of her person, knowing that he may at "any moment dismiss her as a prostitute from his bed; and nothing can exceed "the horror she must feel, whenever, the secret of his first marriage being "divulged, she shall be awakened to her real situation, and she shall find herself "despoiled of her honor, and that the children she has borne are bastards and "outcasts. The real nature of this crime is that of a fraudulent and most aggra-"vated seduction, effected under color of law, with all the solemnities of religion, "and under such circumstances that no prudence or caution could effectually "guard against it. But he who, before his second marriage, apprizes the woman "that he is already a husband, does *her* no wrong. His offence is one to the "State alone, and consists in nothing but the public scandal it affords. The "bigamist, who had concealed his first marriage from his victim, is equally "guilty of this outrage on public decency, and has besides done one of the

But this is not the patriarchal marriage of the Latter-day Saints. There is not a single point of similarity between them, except that the ceremony of marriage is observed in both cases. In every other feature they are as far apart as the antipodes. And yet the statute would degrade our religious ordinance to the level of these dastardly offences. It was not to punish these latter that the law of July, 1862, was passed; for, during the seventeen years which have elapsed since its passage, not a single punishment of that kind of offence has been attempted; but it was to punish the religious marriages of the Latter-day Saints, to call them crimes and to confound them with the hateful offence called bigamy. This being the case, wherein can it be said that our claim, if allowed, would introduce a new element into criminal law? I submit that it is most unfair, and smacks of sophistry, to say that if we are excepted from the operation of this statute, then those who do not make polygamy a part of their religious belief, may be found guilty and punished, while we who do, must be acquitted and go free. For I repeat, that, if we are not punished under this statute, no other person, or persons, in the navy yards, in the arsenals, or in any other place over which the United States have exclusive jurisdiction, or in any of the Territories, will ever be punished for its violation. It was not intended for them, but for us; and if it does not expend its penalties upon us, it will remain a dead letter upon the statute book. Let the criminal annals of the various States of this Union be searched, and how many cases can there be found of plural marriage, such as is practiced in Utah, being tried and punished? Surely the Supreme Court must know how difficult it would be to find the case of a man in any part of this country, who has been tried and condemned for marrying two or more women openly, they and their friends and neighbors all acquiescing and rejoicing in the marriage, then they living decently together, bringing up and educating their children respectably and honorably and in the fear of God. Until such cases occur, it should not be said that we ask an exemption from punishment on account of religion for that kind of an offence for which others are punished.

"greatest possible injuries to an individual. It results from these considerations "that in a woman the crime of bigamy can never be so heinous as in a man, "and that in a man the heinousness of the crime consists altogether in the con- "cealment of the former marriage. * * * Although, as has been "already observed, this is in women a crime of much less magnitude than in "men, yet until the Stat. of 3 and 4 W. and M. (which extended the benefit of "clergy to women) passed, it was punishable in female offenders with death, "but in males only with burning in the hand, and a year's imprisonment."

CHAPTER VII.

Can Murder be practiced under claim that it is Religion ?—*Mala in se* and *mala prohibita*.—Polygamy a statutory crime.—Thuggism and Sutteeism.—An absurd comparison.—Revolt of Nature at the sight of Murder.—Patriarchal Marriage in Utah not criminal.—Neither Men, Women, nor Children wronged.—Liberty of Woman greater than that of Man.—Plural Marriage not evil in its own nature.—Grotius, Theodoret, St. Ambrose, St. Chrysostom, St. Augustine.—Plural Marriage not a crime against law in Utah until 1862.—John Adams' Liberal Views of our system of Religious Liberty.

IT will be conceded, I suppose, by the greatest stickler for the powers of Congress, that it has no power to impose, by its laws, the use of any rites and ceremonies in any church in the Territories of the United States. If it does not have this power, how can it forbid the use of such rites and ceremonies as are already received, approved and practiced by any church? "But," it may be asked, "suppose a church should think "it right to sacrifice infants, and claim that such a sacrifice was a religious "ordinance? Or, suppose a religious congregation should do what the "primitive Christians were falsely accused of doing—partake of the blood "of a newly-slain infant at their secret sacramental feasts—would a claim "that this was a religious practice shield them from the action of the law-"making power?"

Certainly not. These are crimes. They are *mala in se*. They are in and of themselves crimes. These cannot be committed under the name of religion without exposing the perpetrator to the just punishment of the laws. But in regard to what Blackstone* calls "things in themselves indifferent," as he says, "the case is entirely altered. These become either right or "wrong, just or unjust, duties or misdemeanors, according as the munici-"pal legislator sees proper, for promoting the welfare of society, and more "effectually carrying on the purposes of civil life." These are *mala prohibita*. They are made crimes by law. Polygamy is in this class. As a crime it depends entirely for its existence upon statute.† As a civil practice the legislature can exercise its pleasure concerning it. But when it is a religious belief and ordinance, and men and women believe their future salvation and happiness are intimately interwoven with and dependent upon its correct and virtuous observance, it is beyond the reach of the legislative arm. [The distinction between *mala in se* and *mala prohibita*,

* 1 Black. Com., p. 54.

† Bishop's Stat. Crimes, p. 557-582.

which I here make, can be maintained without conflicting with the opinions delivered in Aubert *vs.* Maze and in Lewis *vs.* Welch, quoted by Cooley, 1 Black., sec. 2, page 57, note 12. The law of God is paramount to all civil law.] The first amendment of the Constitution protects it. And as Tucker says,* "Those who prize the union of States will never "think of touching this article with unhallowed hands." As well might the legislature revive the old writ *De hæretico comburendo* and punish whatever it chooses to call *heresy.*

But human sacrifice, or the slaying of an infant for its blood, is a crime. It is murder, against which all nature, without the enactment of human statute, cries out in abhorrence. It is a crime against humanity. It is the destruction of life. He surely is a most illogical reasoner, however, who will assert that because murder is a crime and cannot be permitted by the law, even though a body of Thugs should perpetrate it under the name of religion, plural marriage as a religious ordinance must be interfered with by law. Or that, because the burning of widows upon the funeral pyre cannot be permitted in this country, even though the victim might claim her right to make a sacrifice of herself as a part of her religion, two women shall not be at liberty to marry one man according to the requirement of their religion. In the name of common sense, what possible analogy can there be between the destruction of life and the solemnization of marriage, between practices which extinguish life and an ordinance which prepares the way for life to be kindled and perpetuated? The practice of Thuggism, if carried out, would blot man from existence, would convert the earth into a wilderness, would, in fact, destroy the work of the Great Creator; while marriage, as an old English writer (Jeremy Taylor) beautifully and truthfully says, "is the mother of "the world and preserves kingdoms, and fills cities and churches, and "heaven itself. Like the useful bee, it builds a house, and gathers "sweetness from every flower, and labors and unites into societies and "republics, and sends out colonies, and feeds the world with delicacies, "and obeys and keeps order, and exercises many virtues, and promotes "the interest of mankind, and is that state of good to which God hath "designed the present constitution of the world."

Yet the chief law officer of the Government, the head of the Department of Justice, in discussing this Reynolds case, cited the practice of Thuggism, and the burning of widows in India, as crimes committed in the name of religion, to which he compared plural marriage. His argument, as I saw it reported in the Associated Press dispatches, was, that as Thuggism and widow burning could not be permitted in the name of religion, neither could plural marriage be permitted. Respect for his

* Com. on Black., 1 vol., p. 297.

position as Attorney-General of the United States, prevents me from characterizing this argument as it deserves. For thirty years the people of Utah have been forced to think upon and argue this subject in all its bearings, and there is scarcely a soul in the Territory, who has heard of this argument, who has not been surprised that lawyers and men of sense would use it. Because human sacrifice is wrong, does it necessarily follow that human propagation is wrong?

In a history of the Thugs it is stated that the apprentices are trained by the matured Thugs in their frightful business by degrees. During the first expedition they neither see nor hear anything of murder. These professional murderers, so terribly skilled in their horrid practices, recognize the fact that murder is a deed, to the commission of which men must be gradually familiarized. In this work we have an instance furnished of the summary manner in which untrained human nature expressed its abhorrence of this crime. The witness states that his cousin Kurhora, who was about fourteen years old—an age in the East when both sexes are more matured than with us—was taken for the first time to a Thug expedition. By an oversight of the person who had charge of him, while the strangling of many persons was going on, Kurhora escaped and rode up to the place of the murder. He was so overcome by the horrid scene that the sight of the turbans of the murdered men made him delirious. He uttered screams at the approach of a Thug, and before the day closed he was dead. It needed no law of Congress, no decision of the Supreme Court of the United States, to inform this poor wretch that he had beheld a crime. His whole soul, every fibre of his mental and physical being, revolted against this destruction of life by violence. The very beasts of the field and the fowls of the air, had they beheld the shocking spectacle, would each, according to his nature, have piteously cried against the foul deed. Even the earth itself, though her voice might not be heard, would have uttered her protest,

> "For murder, though it have no tongue, will speak
> "With most miraculous organ."

But what makes the marriage of two or more women to one man a crime? Is there anything in the act itself which makes it such?

Utah Territory was settled by its present citizens in 1847. At that time plural marriage was an accepted and practiced doctrine of the Church to which the great bulk of the people belonged. Men and women married, children were born, families were formed, many times one woman being the only wife of one man; but not unfrequently two and more women marrying one man. Were such marriages criminal? Those who took plural wives were married by the same ceremony or ordinance as those who took but one wife. They lived together, brought up and educated their children, and moved in the same society in the one case as

in the other. The legality of the plural marriages or the legitimacy of the offspring of such marriages, was no more questioned than the legality of the first marriage or the legitimacy of its offspring. Where can the element of wrong be discovered in such a state of society? Who was wronged? Not the women; for they were not coerced. They married of their own free will and choice. Not the men; for they were not overpowered. No combination of women compelled them to take one wife or more than one wife each. Not the children; for no brand of opprobrium was placed upon them. They were welcomed into the world as a crowning and blessed joy, a heritage from the Lord.* Not only was the household gladdened by the advent of the innocent ones, but the neighborhood shared in the jubilation. They were the legitimate fruit of unions solemnized by the holy rites of religion, and upon which heaven smiled and man looked with favor. There was no law against such unions. On the contrary, the law of God, as we believed, expressly commanded and sanctioned them. But even man's law did not condemn them; and where there was no law, there was no transgression of law.

There is an impression among the uninformed that the man who enters into patriarchal marriage in Utah has but little, if any, responsibility connected with it; that upon his partners rest all the burdens and unpleasant features of the relationship; that they, in becoming his wives, become the creatures of his will, and that therefore their civil rights are interfered with. This view is wholly incorrect. It is the women, under the system of patriarchal marriage, who have liberty, and not the men. When once marriage has taken place between the parties, be the woman ever so poor and friendless, ever so much an unprotected stranger in the land, the man who knows her takes upon him a lifelong obligation to care for her and the fruit of their union. For a man to seek for a divorce is almost unheard of. The liberty upon this point rests with the woman, and as regards a Separation, if her position should become irksome, or distasteful to her, even, and she should desire a Separation, not only is the man bound to respect the expressal of her wish to that effect, but he is bound also to give her and her offspring a proportionate share of his whole property. They are no longer under his yoke; but while he and they live, they have a claim upon him from which he is never completely absolved. Surely it must be religion which prompts the Latter-day Saints to incur such serious responsibilities at the risk of being pronounced felons, and being stripped of property and of citizenship by being incarcerated in the penitentiary.

A learned and Christian writer upon the law of nations, a standard authority in Christendom, advances the following proposition:

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* Psalm CXXVII, v. 3.

"*When God permits a thing in certain cases, and to certain persons, or "in regard to certain nations, it may be inferred, that the thing permitted is "not evil in its own nature.*"*

My space will not permit me to give at length his interesting argument upon this proposition; but his logical conclusion is that "Polygamy, "therefore, is not in its own nature, evil and unlawful." In another place† he says, "But it cannot thence be inferred that the thing "[polygamy] is evil in itself, according to the law of nature."

Theodoret says‡ "that in Abraham's time polygamy was forbidden, "neither by the law of nature, nor by any written law."

St. Ambrose, speaking of polygamy, says, "That God, in the terres- "trial paradise, approved of the marriage of one with one; but without "condemning the contrary practice." He then proceeds to quote Sarah's request to Abraham concerning Hagar, and Abraham's response thereto.§

St. Chrysostom, speaking of Sarah, says, "She endeavored to comfort "her husband under her barrenness, with children by her handmaid, for "such things were not then forbidden."‖

In another treatise¶ the same Father says, "Nay more, the law "permitted a man to have two wives at the same time; in short, great "indulgence was granted in those and other particulars."

St. Augustine says, "It is objected against Jacob, that he had four "wives." To which he answers, "which, when a custom, was not a crime."**

In another of his writings he speaks of the custom of having several wives at the same time as "an innocent thing," *inculpabilis consuetudo*,†† and observes that "it was prohibited by no law."‡‡

Respecting Leviticus XVIII, a chapter made very familiar to the people of Utah through a somewhat noted discussion held at Salt Lake City, another author says: "It is very well known, that those who pretend "a plurality of wives was prohibited do not understand what the law is."§§

It is but charitable to suppose that, had the law officer of the Government been familiar with these authorities, he never would have advanced such a comparison as he did between the murder of travelers

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* Grotius, B. 1, c. II, sec. 17.

† B. 2, c. V, sec. 9.

‡ Quaest. XLVII, in Genes.

§ Lib. I *De Abraham*. Cap. IV. Gratian has inserted this passage, and another to the same purpose, in the *Canon Law*, Caus. XXXII, Quest. IV (C. III).

‖ Hom. in Genes.

¶ On Virginity, Cap. 44.

** Lib. XXII, *contra* Faustum, Cap. XLVII.

†† De Doctr. Christ. Lib. III, Cap. XII.

‡‡ De Civit. Dei, Lib. XVI, Cap. XXXVIII.

§§ Persichta Zotertha, Fol. 24, Col. I. Quoted by Grotius.

by the Thugs, the burning of widows in Hindostan, and plural marriage. From the settlement of Utah Territory in 1847, to the year 1862, plural marriage there was neither a crime against nature nor against law. There was not even the semblance of law against it till the latter year. In July, 1862, Congress enacted the law which declares the marrying of more than one woman to one man to be a crime that shall be punished by fine and imprisonment.

There is another authority to which I would like to call the attention of the Attorney-General and my readers at this point. John Adams, the second President of the United States, and one of the most illustrious founders of the Government, wrote a letter to Thomas Jefferson, under date of May 16th, 1822, in which he speaks of religious liberty in these words:*

"I do not like the late resurrection of the Jesuits. They have a "general now in Russia, in correspondence with the Jesuits in the United "States, who are more numerous than everybody knows. Shall we not "have swarms of them here? In as many shapes and disguises as ever "a king of the Gypsies—Bamfield Morecarew, himself assumed? In the "shape of printers, editors, writers, schoolmasters, etc. I have lately read "Pascal's letter over again, and four volumes of the history of the Jesuits. "If ever any congregation of men could merit eternal perdition on earth "and in hell, according to these historians, though, like Pascal, true "Catholics, it is this company of Loyola. Our system, however, of "religious liberty must afford them an asylum. But if they do not put "the purity of our elections to a severe trial, it will be a wonder."

His prejudices against the Jesuits were as strong as those of the most bitter Mormon-eater can be against the people of Utah; but how strong his sense of justice upon the point of religious freedom! They might merit eternal perdition on earth and in hell, "but our system of religious liberty "must afford them an asylum." These were the sentiments of a statesman and true lover of liberty, who subordinated prejudice to principle. I should be disappointed in him if he had not entertained this broad liberality.

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* Works of Jeff., vol. 6, p. 604.

CHAPTER VIII.

Government cannot prescribe Rights of Conscience.—If Patriarchal Marriage can be declared outside of Religion, the Celibacy of Priests can be so declared.—Celibacy and Auricular Confession called Fruitful Sources of Evil.—Precautions to protect Virtue against Celibates.—Pretexts for Legislating against the practices of Unpopular Religions easily obtained.—Who shall declare what is Religion?—Obedience to Patriarchal Marriage known to be the will of Heaven.—This the only cause of its existence.—The law of 1862 a blow at Religion.—Indifference of Congress to crimes as such.—A Paradox.—Every Woman should have the Privilege to Marry.—Crime of "Mormons" not in Seducing, but in Marrying Women.—All human odds are against such Marriages.—Uniformity reached by Truth and Reason easier than by Coercion.—Jefferson upon Uniformity.

IF our Government should attempt to use force in religion, it will find its power stop short at the conscience of man. No truthful, conscientious man, can bend, or deny his convictions at the bidding of King, President, Congress or Court. Congress and Court may say what they think is religion and what is not religion, and those who are of their way of thinking may accept their definitions; but no free man will allow them to prescribe what his religious duty shall be, and how it shall be rendered to his Creator. The sentiment of John Bunyan, which he uttered when imprisoned for disobedience to an earthly statute, was: "I cannot obey, "but I can suffer." Grant to Congress and the Courts the power to define the rights of conscience, and the limit beyond which faith shall not be carried into action, and religious liberty is practically at an end. The battles for spiritual freedom, which have been so nobly fought in the generations past, and which have been gained by the sacrifice of so much precious blood, will, so far as we are concerned, have been fought in vain. We shall be remanded back to the days of Henry the VIII, when "the "King's Majesty had as well the care of the souls of his subjects as their "bodies; and might by the law of God, by his Parliament, make laws "touching and concerning as well the one as the other." *

If Congress can say by enactment to one religious community, "You "shall not obey the law of your conscience and what you declare to be "the command of God to you in the matter of marriage," it can say the same to other religious denominations respecting their practices. If it is within the province of Congress to imprison in a penitentiary a people

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* Green. Hist. of Eng. Peo., vol. 2, p. 156.

who believe that the marriage of Abraham, Jacob, Elkanah, and other holy men was approved by the Almighty, and that they themselves have been commanded to do likewise, when they carry their belief into practice, what is there it cannot do in matters of religion? When Government enters into the domain of conscience where shall it stop? If it can say to the Latter-day Saints, "Your marriages are not religion;" it can with equal consistency say to the Shakers and to Roman Catholic priests, "You must marry; abstinence from marriage is not religion." Upon the claim that our marriages can be prohibited and made penal offences, because of the right of Government to interfere where peace and good order are involved, what shall be said of and done with the celibacy of the Catholic clergy? We do not allude to them because we have prejudice against them; for we believe the clergy of the Catholic church are, as a body, sincere, honest and virtuous; but because that church has figured in history and furnishes illustrations upon the point we are urging. If we take the testimony of Protestant writers, they inform us that the celibacy of the clergy has been a fruitful source of evil. In more than one country the people, it is asserted, obliged a new pastor, upon entering upon his functions, to select a concubine. This they thought a necessary precaution, to protect the virtue of his female parishioners and the peace of the families entrusted to his spiritual direction. The most scandalous crimes, they also assert, have had their origin in the intimacy which arises between the women who confess and the priests who are their confessors.* Here are principles, which upon the theory put forth in this decision of the Supreme Court, "break out into overt acts against peace and good "order." Let Congress take the view that the celibacy of priests and auricular confession are "in violation of social duties and subversive of "good order," and would it not be justified, according to the doctrine of this decision, in compelling the Catholic clergy to marry and dispense with auricular confession, or suffer the penalty of fine and imprisonment? It happens to be the Latter-day Saints against which the late decision is hurled; but the precedent once established, and what security has any unpopular sect for religious liberty? History teaches us that it is not a difficult thing to obtain pretexts for imprisoning and killing people of an unpopular religion. Catholic and Protestant, Episcopalian and Presbyterian, Quaker and Baptist, Infidel and Jew, have each in their turn suffered for carrying their opinions into practice. Each one, at one time or another, has been guilty of allowing his principles to break out into "overt acts" which, in the opinion of his persecutors, were "against peace "and good order." Do I overstate the case when I say, that if Protestant bigotry were to be aroused to-day upon the celibacy of priests and nuns

* See Lea's Sacerdotal Celibacy.

and auricular confessions, and the Catholics were as unpopular and as powerless politically as the Latter-day Saints, the United States Supreme Court would find as much justification for Congress prohibiting those religious practices as our plural marriages? It is not the first time in the history of Christendom that a legislative body has been sustained by a Court in punishing innovations in religion, and in enacting laws for "abolishing diversity of opinions in certain articles concerning Christian "religion." Neither is it the first time that martyrs for principle have declared, as the Latter-day Saints now do, that "our religion only is our crime."*

Whenever religion has been denounced, persecuted, and its believers punished, their heresies have always been described in very much the way that the plural marriages of the Latter-day Saints have been. The ground for punishment has been that the religious observances of the victims were violative of social duties or subversive of good order. This has been the assertion of persecutors always; how else could they justify their conduct? In vain did the two Anabaptists in the seventeenth year of Elizabeth's reign, and the two Arians in the ninth year of James the First,† or later still in our own land, in the cases of Quakers and Baptists, plead that they were only exercising the rights of religion in their practices. They were told they interfered with uniformity, they subverted good order; and they were martyred therefor. So now, patriarchal marriage neither violates social duties, nor subverts good order, any more than very many observances which have been declared to be heresies in past times, but which now are practiced without exciting wrath. As to this ordinance not being religion, who shall judge of this? Who shall stand between my Maker and me, and shall dictate to me in what direction I shall obey Him, and what not? Has any power on this land, under our Constitution, the right to dictate to me what is religion and what is not, so long as I do not, in my worship, and my observances, and my example, interfere with the rights of my fellow creatures? Each human being must decide upon what is religion for himself and for herself. The Latter-day Saints solemnly protest, in the presence of the Lord, that in obeying this doctrine of patriarchal marriage they fully believe they are obeying the will of heaven. Hundreds, perhaps thousands, of them testify they know that it is a true doctrine, and had they not obeyed it they would have stood condemned by the Lord and their consciences. But had they not been thus convinced, neither men nor women would ever have entered into plural marriage. This is the only cause of its existence among the Latter-day Saints. Had the Lord required celibacy of them

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* Green. Hist. Eng. Peo., vol. 2, p. 416.

† Black., p. 48.

instead of marriage, and impressed it upon their consciences as He did the requirement to marry, they would never have married. No monks or priests in the Roman Catholic church would have forsworn the society of women any more joyfully than many of them would have done. So with those who are now wives. They became wives because they conscientiously believed it to be the will of heaven that they should occupy that position; that the time had come spoken of by the prophets; but knowing their devotion to principle as I do, and their willingness to make any sacrifice which the Lord should require, I am sure that had they been convinced it was the will of the Lord they should take vows as nuns do, they would have complied with as little hesitation as they did with the requirement that they should marry.

Can a Congress say that, with feelings of devotion such as I describe, this ordinance is not a part of religion? The Supreme Court, in this decision, says that Congress cannot pass a law which shall prohibit the free exercise of religion. Yet here are people whose conscience impels them to marry as an act to please the Deity, an act of salvation, and a Congress inflicted a penalty upon them for so doing. The people of the Territories may commit any conceivable crime with women, but no Congress has enacted a law punishing such acts; but because a people practice the ordinance of marriage as a part of their religion, the act is declared to be a felony. What can this be but a blow at religion? Who can give the Congress, which enacted this, credit for zeal against crime? Where is the zeal of Congress in reference to criminality nearer home? In the District of Columbia, seductions, adulteries, abortions, infanticides, atrocious violence upon women in lonely places, and shameless profligacy, are of constant occurrence; but what has Congress done to check these dreadful evils? The District of Columbia is under its immediate control. Out of the two years prescribed as the duration of a Congress, that body sits in Washington about half of the time.

"——O, the good gods!
"How blind is pride! what eagles we are still,
"In matters that belong to other men,
"What beetles in our own!"

They could not see the crime which surrounded them in 1862; but they heard that in far distant Utah the people believed in marrying women instead of seducing them, in rearing offspring instead of destroying them, and called this religion. They were resolved that they would have no such religion. A religion that led men to marry women they were unaccustomed to, knew nothing about, and would not have. They would have a law that should make it a crime to marry. Men who married should be fined and imprisoned. Yet men who went into the same Territory and who had no religion, or who had a religion which confined them

to one wife, were at liberty, so far as Congress was concerned, to commit every kind of abomination with and outrage upon women, and they were honorable men! The action of Congress has led irrevocably to the conclusion, paradoxical as it may seem, that he who is guilty of immorality, knowing it to be wrong, is far less criminal than he who marries, believing it to be right.

Our religion teaches us that every woman who desires marriage should have the privilege; that there should be no portion of the sex debarred by law from becoming wives; that there shall be no element left for base men to prey upon and from which recruits to vice can be gained. Men have legislated, and with what results, to woman? In old settled countries especially, their laws, limiting marriage, consign a large portion of the sex to perpetual celibacy. They never can be wives, but they can be mistresses. They never can be mothers, unless they place upon their innocent offspring a brand of shame and bequeath them a heritage which is deemed dishonorable. Miss Mulock in her book, "*A Woman's Thoughts "about Women,*"* states the experience of Sunday school teachers as given to her, that of their pupils who are seduced, an extremely large proportion are "of the very best, refined, intelligent, truthful and affec- "tionate." It is because we will have none of this that we are threatened with punishment. If we seduced women, committed adultery with them, or in fact, did anything but marry them, the law of Congress would not affect us. Our crime consists in bestowing upon woman the virtuous title of wife and making her children honorable; we have ample evidence from many eminent sources that the people of Utah are peaceable, industrious, frugal, thrifty and honest. The only fault humorously found with us is that we are too much married. In this respect we are not in harmony, it is said, with the rest of the nation, and uniformity is desirable and must be enforced. But if our belief and practice are erroneous, will they not fall before light, intelligence and truth? Truth has the Creator for its support. It is eternal as He is eternal. Give it a fair field and it will prevail. It is only error which needs the support of the Government, which requires to be bolstered up by the strong arm of power. We are surrounded by an adverse and aggressive public sentiment. The odds are all against our system of marriage. It brings care and responsibility, and is unpopular. If I entertained the views that prevail outside of Utah, and which I suppose to be fully represented in Congress, I would think it punishment enough for men who married more wives than one, to have to live with them, to support them and to support and educate their children. If I shared those views, I would think that a man who lived with more than one woman as a wife at one time, and the woman who

* pp. 291-293.

with one man lived in that relationship, would need religion, for, without its aids and consolations, their home would be a place to fly from rather than to desire. If I were of that opinion I would suppose the "Mormons" would look upon the law of Congress as a relief, a means by which they could get rid of their plural wives and their children.

I say, give truth and reason fair play, therefore, and they will accomplish more towards bringing about uniformity than coercion. Upon this point hear Jefferson again.* "Millions of innocent men, women, "and children," he says, "since the introduction of Christianity, have been "burnt, tortured, fined, imprisoned; yet we have not advanced one inch "towards uniformity. What has been the effect of coercion? To make "one half the world fools and the other half hypocrites. To support "roguery and error all over the earth. Let us reflect that it is inhabited "by a thousand millions of people. That these profess probably a "thousand different systems of religion. That ours is but one of that "thousand. That if there be but one right and ours that one, we should "wish to see the 999 wandering sects gathered into the fold of truth. "But against such a majority we cannot effect this by force. Reason and "persuasion are the only practicable instruments."

CHAPTER IX.

"Mormons" punished for violating law, not for Religion.—History full of similar instances.—If our practices are false we shall have to suffer the consequences.—Not Man's prerogative to punish purely Religious offences.—Disposition to inflict purgatory here.—Lieber upon laws respecting Religion.—Montesquieu counsels the avoidance of Religious penal laws.—Tucker as to protection due from the State.—Vattel upon what Citizens have the right to do to avoid violating their Consciences.—For peace and liberty of Conscience, "Mormons" placed twelve hundred miles between themselves and those to whom their Religion was obnoxious.—Happy condition of affairs in Utah.—Introduction of Vice, and efforts to overthrow Religion.—Crowning Outrage.

THE common expression is, "The Mormons are punished, not for their "religion, but for breaking the law." Louis XIV required all his subjects to come to mass; those who did not were punished with a vengeance. For what? Not for their religion, said the king and his

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* Notes on Va., Query XVII.

courtiers and officers, but for disobeying the king's laws. Henry VIII made the denial of the doctrine of transubstantiation punishable by burning. But he and the instruments of his will did not think they were burning people for their religion; it was for the want of it and for their violation of law. History is full of instances of this kind. Thousands have suffered upon the rack, at the stake, upon the scaffold, in dungeons, not for their religion, but because they violated a law. Like the Congress of the United States in the enactment of the law of July 1st, 1862, against the Latter-day Saints, they passed laws which they knew men and women could not in conscience obey, then they punished them. They laid traps for them. Then, when they walked into their traps, they subjected them to the most horrible tortures, to the most frightful and ignominious deaths, and justified their action by appealing to the law. This is precisely what Congress did in the case of the law in question and what the United States Supreme Court has done in sustaining it. They say, as persecutors in all ages have said to their victims, you have no right to a conscience upon this point, it is not religion, there is a law against it, and you must endure its penalties. They attempt to deprive us of honor, of estate and of liberty, and for what? If our doctrines are false and our practices are not what we think they are—according to the will of heaven—we shall be the sufferers and not those who do not believe or indulge in them. So long as we do not intrude upon our fellow-men or interfere with their rights and happiness, it is not their right to punish us. The punishment of false doctrines is the prerogative of the Great Creator. He has reserved that to Himself, for such deeds are an offence against His majesty, and for them He has reserved the proper punishment.

If man should take upon himself the correction and punishment of his fellow-man in religious matters, what a pandemonium of warring sectaries we should have! Each sect would be struggling for the ascendancy, and when obtained, would usurp the province of the Almighty Father of the race. They would deal with their fellow-men as though they themselves were immortal, omniscient, and had a perfect knowledge of all the decrees of heaven, while their victims were grovelling, ignorant, short-sighted worms of earth. The Latter-day Saints have positive views respecting the Gospel of the Son of God. They are satisfied that many doctrines taught by popular sects are false, that many practices flowing from those doctrines are contrary to the will of heaven; but what of that? Have they the right to interfere to prevent such acts of worship upon the part of their fellow-men? Certainly not. If they were vastly in the majority, and full of strong convictions upon those subjects, as they are, they would not have any such right. They might reason and teach, use moral suasion and Biblical argument, but beyond that they

could not go without an offence to the great Creator, neither can others be justified in going beyond this with them. If, as all who receive the Bible as the word of God believe, the Lord will hereafter reward and punish men and women for the deeds done in the body, is it not plain that man trenches upon His domain, when, for entertaining religious opinions and the practice of acts of worship which do not interfere with his enjoyment or his rights, he attempts to anticipate the Almighty and rewards and punishes these things at his pleasure here? One would think that those who believe that sinners against heaven will be plunged into the lake of fire and brimstone, never by any possibility to be extricated therefrom, would be satisfied to wait until the offender died and not attempt to give him a foretaste of that torment here. But many, while loudly avowing their belief in the horrible sufferings which they describe as awaiting those who do not worship as they do, are not content to let the few short years allotted to man on the earth pass away without making those who, in their eyes, are sinners, feel their vengeance. They act as though they were afraid that, without excessive watchfulness on their part, those wicked wretches might escape the knowledge of the Lord. It is in this spirit that petitions are sent in from all parts of the country for the enforcement of thorough measures of punishment against the people of Utah. In our wilderness homes, which we have sought out and created by untold privation and unceasing toil, we have not interfered with the happiness or enjoyment of others. We are far removed from them and our example cannot affect them; but yet they want us punished. They would send us to prison; they would break up our homes, separate our families, dishonor our wives and children, and all because of their zeal for morality and holy religion! They desire that we shall be bereft of the peace and happiness we now enjoy, and made to feel that purgatory on earth which they are confident is only preliminary to the pains which we shall endure hereafter.

Professor Lieber, in speaking of such legislation as I have been discussing, says: "If laws are passed respecting religious beliefs they "are naught in themselves, because they aim at that which is impossible, "to believe according to command." He claims the undoubted right to disobey the law, and celebrate in secret any service essential to his religion.* Montesquieu† says, "Penal laws ought to be avoided "in respect to religion. History informs us," he says, "that they "never have had any other effect but to destroy." Will our Government profit by the lessons of history? Let it not in our case wantonly and flagitiously discard the pledges of the Constitution. Let

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* Pol. Eth., B. 4, Sec. 27, pp. 303, 304.

† Spirit of Laws, B. 25, C. 12, p. 133.

it not substitute *might* for *right.* Many may think our belief wrong and fanatical; but, because they have this idea, are they justified in attempting to deprive us of our rights? It is still our religion. We are human beings and free-born, responsible to God for our faith. Who then, shall say to us that we may have liberty of bodily action, but that in our faith we cannot be free? Why should we not have the right we are willing to grant to others? Who has been coerced by us? Towards whom have we been aggressors? With whose religion have we interfered? Upon whom have we ever attempted to force a form of belief or worship? Tucker, in his commentaries on Blackstone,* quotes with approbation the sentiment of Dr. Price that "not only all Christians, but "all men of all religions, ought to be considered by a State as equally "entitled to its protection, as far as they demean themselves honestly and "peaceably." I assert that we are both honest and peaceable, that neither our practice nor our examples are injurious to others. Even if our religion was offensive, and our presence was disliked, we did what the most eminent authority upon the laws of nations says we had the right to do. Vattel says:

"Finally, if the number of citizens who would profess a different "religion from that established by the nation be inconsiderable; and, if "for good and just reasons, it be thought improper to allow the exercise of "several religions in the State—those citizens have a right to sell their "lands, to retire with their families, and take all their property with "them. For their engagements to society, and their submission to the "public authority, can never oblige them to violate their consciences. If "the society will not allow me to do that to which I think myself bound "by an indispensable obligation, it is obliged to allow me permission to "depart."†

We can quote no higher legal authority than this, and this is precisely what we did, and for the reasons which Vattel says are justifiable—to enjoy the quiet and undisturbed rights of conscience. We traveled upwards of twelve hundred miles beyond the frontier of civilization. We placed this great distance between us and those who hated us. And, we did this, too, without the opportunity of selling our lands or taking our property with us. We could not sell the one at a fair price and we could not carry the other. But, rather than violate our consciences, and abandon our religion, we were willing to forsake all. Freedom of conscience, liberty to worship God according to its dictates, was of such priceless value that we thought no earthly sacrifice too great for its sake. We plunged into the wilderness. The fierceness of untamed and savage

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* Vol. I, pt. 2, Ap. pp. 6, 7.

† Vattel, B. 1, C. 12, Sec. 130.

men, the ferocity of wild beasts, we were willing to encounter, if we could only gain freedom of conscience. Even the sombre and frowning desolation of deserts and mountains, with extreme privation, hardship and excessive toil, had no terror where the soul could be free, and the worship due the Creator could be rendered in peace. These were gladly endured because there was none to molest or to persecute. There were none to stir up hatred and strife, there were none to organize mobs, to shoot and drive men and women, to burn houses, to destroy property, to threaten, to harass or to annoy. To stand guard at the residence of prominent citizens, to lie down to sleep expecting to be aroused by signals to repel an attack, were not necessary. Peace and quiet and freedom of conscience held uninterrupted reign. From the day the valleys of Utah were settled, every man of every creed has had liberty of conscience and of worship. There has never been a day that a reputable man of any denomination could not get a place in which to preach, and a congregation to listen to him. From the extreme northern to the extreme southern settlement an unprotected woman, whether young or old, feeble or strong, could walk every road in city or country, by night or day, without hearing a word of insult or witnessing a gesture of disrespect. Woman was held to no stricter accountability to be pure than her brother, man. Chastity was held to be the crowning virtue in both sexes. Intemperance had no votaries. That unhappy being, who is doomed to disease and abject wretchedness and an early death, and through whose sacrifice the domestic circle, in monogamic lands, is preserved comparatively free from pollution — she whom Leckey* calls "the eternal priestess of "humanity, blasted for the sins of the people, who appears in monogamic "lands as the perpetual symbol of the degradation and sinfulness of "man"—that unhappy being did not exist in the valleys of Utah; for prostitution was unknown. Illegitimacy was unrepresented. A disease that I will not name had not a victim in the land. Travelers' goods were as safe in cloth-covered wagons in the streets and by the highways' sides, as if they were in fireproof stores.

This happy condition of affairs prevailed for years. Then came a change. The civilization which deemed us unfit for its companionship, and from whose cruel and destructive assaults we had fled, overleaped the barriers of distance which we had placed between ourselves and it. With the old, aggressive malignity it forced itself upon us, and re-asserted its right to subdue us. Its advocates have not been content to meet us upon equal terms. Forgetting the past wrongs inflicted upon us, forgetting what we had endured in leaving and sacrificing all for peace, forgetting that we had done all that people could do to remove every cause of

* European Morals, vol. 2, p. 300.

offence by seeking homes in the savage and remote wilderness, they have brought the strong arm of the Government to bear upon us. They have called vice to their aid. Drinking saloons, gambling saloons, and brothels have been introduced into our cities. Missionaries of evil have come in troops, intruding upon our peace with their cries about the superiority of their system of monogamy, with their degraded passive instruments of lust — those "blasted priestesses of humanity" — with their licentious habits, with their diseased bodies. They have aimed to break up existing harmony, to destroy order, to overthrow union, to stifle conscience, to crush religion, to stamp out virtue, and to make vice popular and supreme. While truth and reason were untrammelled and had a fair field in which to operate, this condition of affairs might be endured, but Congress threw its weight in the scale against us. Closing its ears to our appeals, disregarding our protestations, it has, with impious presumption, pointed out to us a command of our Creator, which it commands us not to obey. And now, because of its high authority, comes the crowning outrage of all, the DECISION OF THE SUPREME COURT OF THE UNITED STATES, justifying the action of Congress; its prejudiced reasoning, and partial quotations of history, endeavor to prove that we are outside of the protection of the Constitution and have only such rights of conscience as the Legislature shall see fit to grant unto us!

CHAPTER X.

Summary of proofs as to the extent of Religious Liberty to be enjoyed under the Constitution.

HAVING examined the authorities and events of history cited by the Court in the decision of the Reynolds case, let me sum up what has been proved as to the character and extent of the religious liberty established by the Virginia Act establishing religious freedom, and the Constitution of the United States and its first amendment:

1st. That Jefferson, Madison, and their compeers, all maintained that religion, or the duty which we owe to our Creator, was a matter with which Government has nothing to do, so long as its actions are not "injurious to others," or "where it does not trespass on private right or "public peace;" that Congress was not only, by their design, "deprived of "all legislative power over mere opinion;" but was also deprived of all

legislative power to reach the religious actions or practices of any people which do not interfere with the rights of their fellow-men.

2d. That—to use the strong language of John Adams—men who might even be thought fit to "merit eternal perdition on earth and in "hell" were entitled, under our system of religious liberty, to the free and full exercise of their religion.

3d. That Jefferson and the Virginia Assembly designed, by the enactment of the law establishing religious freedom, quoted by the Supreme Court, in its decision, to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohammedan, the Hindoo and the Infidel of every denomination.

4th. That by this Act, and the previous Declaration of Rights, no preference was made between Christianity and the other systems of religion that prevail in the world, any more than there was between the different sects of Christianity.

5th. That Jefferson exposed himself, by framing and advocating this law, to the animadversions of pious people for not recognizing Christianity as possessing more rights in this country than the creed of Mecca and the plural marriages ["voluptuousness"] of Mohammed.

6th. That Washington viewed this fabric of government as "an "asylum for the poor and oppressed of *all nations and religions.*"

7th. That the men of various States, by whose votes the Constitution became the Supreme Law, contemplated the possibility of Pagans and Mohammedans, as well as Papists and Jews, living in this country, and, if so, enjoying perfect and unrestrained liberty under the Constitution, to practice their religion, and not only that, but to hold high office, and even fill the President's chair.

8th. That one of the objections to the Constitution was that, by prohibiting religious tests, a door was opened for Jews, Turks, and Infidels.

9th. That the system of patriarchal marriage of the Latter-day Saints, as it is enjoined by their religion, is "not evil in its own nature," and "does not trespass upon private right or the public peace," is fully protected by the first amendment to the Constitution.

10th. That the crime of bigamy, against which the law of James was enacted, and patriarchal marriage, are as far apart as the antipodes.

11th. That there is no new element introduced into criminal law by the exemption of the Latter-day Saints from a statute punishing bigamy.

12th. That the statute of Congress, of July, 1862, prescribing a punishment for bigamy, was only designed to reach the religious ordinance of the Latter-day Saints, and no others have felt its application.

13th. That, while murder and the burning of widows, being *mala*

in se, can not be practiced under the name of religion, patriarchal marriage, not being in and of itself a crime, may be thus practiced.

14th. That, if the latter ordinance can be declared outside of religion, under the Constitution, many other religious practices, now recognized as such, can, with equal propriety, be thus declared. And,

15th. That, having forsaken our old homes and property, and plunged into a remote and unknown wilderness to enjoy peace and to avoid violating our consciences, as Vattel declares a religious people have a right to do, it would be an arbitrary and unjustifiable exercise of power for a government in the old world to pursue its citizens to their new homes and oblige them to violate their consciences; and much more so for the Government of the United States, with our Constitution guaranteeing religious liberty, to make such an attempt.

CHAPTER XI.

Conclusion.

IN conclusion, let me appeal, in the name of that Almighty Being whom we, in common with other religious people, profess to serve, and from whom we derive our existence, to the honor, magnanimity, and spirit of fairness of our fellow-citizens who bear rule in Congress, in the Courts, in the Cabinet and the Presidential chair, to grant us our equal rights as citizens in all religious concernments. Let not the escutcheon of this great nation be tarnished by acts of oppression against a people whose only cause of offence is non-conformity with popular religions, and who, having suffered the most dreadful enormities because of this, fled to the mountains and laid the foundation of a commonwealth, the growth and prosperity of which are the admiration of every unprejudiced visitor. Let it not be said that in this free republic a people are denied a religious liberty which two hundred years ago Locke, could his views have prevailed, would readily have granted. Let me appeal to the Supreme Court to grant a rehearing to the Reynolds case. He has been sentenced to a punishment not prescribed by the law. To refuse a rehearing on this account alone would be an outrage—to send him to prison and punish him, as the unlawful sentence decrees, would be an act of infamy. As Jefferson has been appealed to, let his voice be heard. Surely one little corner of the mantle of protection which he provided for Jew and

Gentile, Christian and Mohammedan, Hindoo and Infidel, can be found to cover this man who obeyed the requirement of his religion and married two wives. He has neither used the vile arts of the seducer nor the adulterer. He has taken advantage of no man's daughter, sister, or wife. But he has taken women in honorable wedlock, in the broad light of day, with the full knowledge and consent of wives, parents and all concerned. He has sustained them and their children respectably and honorably. And shall this man be punished? Shall this man be degraded from citizenship, be stripped of his property, be declared a felon? In the dockyards, in the arsenals, in the Territories of the United States, in the places over which Congress claims and exercises jurisdiction, the seducer, the adulterer and the vile debauchee can ply their devilish arts upon innocent and unsuspecting victims, and walk with heads erect and fronts unabashed, and who troubles them? I speak for Utah, which I know. Appointed by the President, confirmed by the Senate, they have sat upon our judicial bench, they have occupied our gubernatorial chair, they have acted as our District Attorneys, our Secretaries, and our Marshals, they have been our grand and petit jurors. Not that all our Federal officers have been men of this character, for we have had, and still have, honorable men in these positions; but we have had very many of this class, who, in the name of a pure morality, and of an orthodox religion, have indicted us, have prosecuted us, have placed us under bonds, and have convicted us. Our crime has been: We married women instead of seducing them; we reared children instead of destroying them; we desired to exclude from the land prostitution, bastardy and infanticide. If George Reynolds is to be punished, let the world know the facts. Conceal them not under the thin veil of hypocritical pretence. Let it be published to the four corners of the earth that in this land of liberty, the most blessed and glorious upon which the sun shines, the law is swiftly invoked to punish religion, but justice goes limping and blindfolded in pursuit of crime.

APPENDIX.

TEXT OF THAT PORTION OF THE DECISION DISCUSSED IN THE FOREGOING REVIEW.

5. As to the defence of religious belief or duty.

On the trial, the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church "that it was the duty of male members of said church, "circumstances permitting, to practice polygamy; * * * that this duty "was enjoined by different books which the members of said church believed to "be of divine origin, and among others the Holy Bible, and also that the mem- "bers of the church believed that the practice of polygamy was directly enjoined "upon the male members thereof by the Almighty God, in a revelation to Joseph "Smith, the founder and prophet of said church; that the failing or refusing to "practice polygamy by such male members of said church, when circumstances "would admit, would be punished, and that the penalty for such failure and "refusal would be damnation in the life to come." He also proved "that he had "received permission from the recognized authorities in said church to enter into "polygamous marriages; * * * that Daniel H. Wells, one having "authority in said church to perform the marriage ceremony, married the said "defendant on or about the time the crime is alleged to have been committed, to "some woman by the name of Schofield, and that such marriage ceremony "was performed under and pursuant to the doctrines of said church."

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he "was married as charged—if he was married—in "pursuance of and in conformity with what he believed at the time to be a "religious duty, that the verdict must be not guilty." This request was refused, and the court did charge "that there must have been a criminal intent, but that "if the defendant, under the influence of a religious belief that it was right— "under an inspiration, if you please, that it was right—deliberately married a "second time, having a first wife living, the want of consciousness of evil intent "—the want of understanding on his part that he was committing a crime—did "not excuse him; but the law inexorably in such cases implies the criminal "intent."

Upon this charge and refusal to charge the question is raised whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is whether the law now under consideration comes within this prohibition.

The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution attempts were made in some of the colonies and States to legislate, not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed against their will for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784 the house of delegates of that State, having under consideration "a bill establishing provision for teachers of the Christian religion," postponed it until the next session, and directed that the bill be published and distributed, and that the people be requested "to signify their opinion respecting "the adoption of such a bill at the next session of assembly."

This brought out a determined opposition. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the "Creator," was not within the cognizance of civil government. (Semple's Virginia Baptists, Appendix.) At the next session the proposed bill was not only defeated, but another "for establishing religious freedom," drafted by Mr. Jefferson (1 Jeff. Works, 45; 2 Howison's Hist. of Va., 298), passed. In the preamble of this act, (12 Hening's Stat., 84) religious freedom is defined, and after a recital "that to suffer the civil magistrate to intrude his powers into the field of "opinion, and to restrain the profession or propagation of principles on supposi- "tion of their ill tendency, is a dangerous fallacy which at once destroys all "religious liberty," it is declared "that it is time enough for the rightful pur- "poses of civil government for its officers to interfere when principles break out "into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the state.

In a little more than a year after the passage of this statute, the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration ensuring the freedom of religion, (2 Jeff. Works, 355,) but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. (1 Jeff. Works, 79.) Five of the States, while adopting the Constitution, proposed amendments. Three, New Hampshire, New York and Virginia, included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly at the first session of the first Congress the amendment now under consideration was proposed, with others, by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, (8 Jeff. Works, 113,) took occasion to say: "Believing with you, that religion is a matter "which lies solely between a man and his God, that he owes account to none "other for his faith or his worship, that the legislative powers of the Govern-

"ment reach actions only, and not opinions, I contemplate with sovereign rev-
"erence that act of the whole American people which declared that their legisla-
"ture should 'make no law respecting an establishment of religion or prohibiting
" 'the free exercise thereof,' thus building a wall of separation between church
"and state. Adhering to this expression of the supreme will of the nation in
"behalf of the rights of conscience, I shall see with sincere satisfaction the
"progress of those sentiments which tend to restore man to all his natural
"rights, convinced he has no natural right in opposition to his social duties."
Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon church, almost exclusively a feature of the life of Asiatic and African people. At common law the second marriage was always void (2 Kent's Com., 79), and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts and until the time of James I, it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil, the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offenses against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the statute of 1 James I, chap. 11, the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was, at a very early period re-enacted, generally, with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that, on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended, as an amendment to the Constitution of the United States, the declaration in a bill of rights that "all men have an equal, natural and unalienable right to the free "exercise of religion, according to the dictates of conscience," the legislature of that State substantially enacted the statute of James I, death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy or "polygamy be punishable by the laws of this Commonwealth." (12 Hening's Stat., 691.) From that day to this, we think it may safely be said, there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts, and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the goverment of the people, to a greater or less extent, rests. Professor Lieber says polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. (2 Kent's

Com., 81, note e.) An exceptional colony of polygamists, under an exceptional leadership, may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and, while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one religiously believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society, under the exclusive dominion of the United States, it has been prescribed that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this, would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

A criminal intent is a necessary element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew that he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime, therefore, was knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion, it was still belief, and belief only.

In Regina *v.* Wagstaff, (10 Cox Crim. Cases, 531,) the parents of a sick child, who omitted to call in medical attendance because of their religious belief that what they did for its cure would be effective, were held not to be guilty of manslaughter, while it was said the contrary would have been the result if the child had actually been starved to death by the parents, under the notion that it was their religious duty to abstain from giving it food. But when the offence consists of a positive act, which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made. No case, we believe, can be found that has gone so far.

6. As to that part of the charge which directed the attention of the jury to the consequences of polygamy.

The passage complained of is as follows: "I think it not improper, in the

"discharge of your duties in this case, that you should consider what are to be the "consequences to the innocent victims of this delusion. As this contest goes on "they multiply, and there are pure-minded women and there are innocent chil- "dren—innocent in a sense even beyond the degree of the innocence of child- "hood itself. These are to be the sufferers; and as jurors fail to do their duty, "and as these cases come up in the Territory of Utah, just so do these victims "multiply and spread themselves over the land."

While every appeal by the court to the passions or the prejudices of a jury should be promptly rebuked, and while it is the imperative duty of a reviewing court to take care that wrong is not done in this way, we see no just cause for complaint in this case. Congress, in 1862, (12 Stat., 501,) saw fit to make bigamy a crime in the Territories. This was done because of the evil consequences that were supposed to flow from plural marriages. All the court did was to call the attention of the jury to the peculiar character of the crime for which the accused was on trial, and to remind them of the duty they had to perform. There was no appeal to the passions; no instigation of prejudice. Upon the showing made by the accused himself, he was guilty of a violation of the law under which he had been indicted, and the effort of the court seems to have been, not to with- draw the minds of the jury from the issues to be tried, but to bring them to it; not to make them partial, but to keep them impartial.

Upon a careful consideration of the whole case, we are satisfied that no error was committed by the court below, and the judgment is consequently affirmed.